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Reeves

HISTORY
OF THE
ENGLISH LAW.

VOL. II.

T. DAVISON, Lombard-street,
Whitefriars, London.

ENGLISH LAW

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ENGLISH LAW,
FROM THE
TIME OF THE SAXONS,
TO THE END OF
THE REIGN OF PHILIP AND MARY.

BY JOHN REEVES, ESQ.
BARRISTER AT LAW.

THE THIRD EDITION.

IN FOUR VOLUMES.

VOL. II.

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1814.

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WHAT has been said of our criminal law in the reign of Henry II. was confined to such pleas as related to the king's crown and dignity. We shall now be enabled to treat more fully of this subject, in all its parts. As criminal justice was most commonly administered in the country before the justices itinerant^(a), it may be proper to give some account of the course of pro-

^(a) Vid. ant. Vol. I. 201.

ceeding there; after which we may go on to the consideration of crimes, as to their nature and punishment; with the method of pursuing and prosecuting offenders, from the time of the fact committed to their condemnation in court.

The eyre. Previous to the coming of the justices itinerant, there issued a general summons, as was before shewn(*a*), for all persons to attend at a certain place and time; which time was to be at least fifteen days from the proclamation of the summons. When the justices came, the first step to be taken was to read the *writs* or commissions under which they derived their authority. After this, if the justices pleased, one of them, being, as Bracton says, *major et discretior*, was openly to propound the occasion of their coming, to enlarge upon the utility of the institution of *itineria*, and the benefits that followed from keeping peace and good order: he was particularly to notice the violation of justice committed by murderers, robbers, and burglars; and inform the whole assembly that the king commanded all his liege subjects by their faith, and as they would preserve their own property, to give every advice and assistance towards repressing such and the like offences.

After this, says Bracton, the justices were to withdraw into some private place; and call to them four, or six, or more of the *maiores comitatús*, who were called(*b*) *busones comitatús*; being persons on whom the rest depended, and by whom they were governed. With these the justices

(*a*) Vid. ant. Vol. I. 403.

(*b*) The anomalous appellation of *busones* is to be met with no where but in this passage of Bracton. Sir Henry Spelman says, he had seen a MSS. that was written *barones comitatús*; if so, it possibly means the *barones majores*, or lords within the county. The distinction between *barones majores* and *minores* had become more important in the days of Bracton, than it had been before; for it is supposed that the latter were, about that time, excluded from the legislature, writs of summons being directed only to the former. Vide Spelman, and Du Cange voce *busones*.

were to converse, and shew how provision was made by the king and his council for all persons, as well knights as others, being fifteen years of age, to make oath that they would not harbour any outlaws, murderers, robbers, or burglars, nor collude with those who did; and, if they knew of any, that they would cause them to be attached, and report it to the sheriff and his bailiffs; that they would follow every hue and cry with their family and men; that they would arrest all suspected persons, without waiting for the mandate of the justices or sheriff, and make report to the justices, or sheriff, of what they had done. These principal persons of the county were to swear to observe all this; and moreover, that if a person came into a town to buy victuals which were suspected to be for the maintenance of malefactors who were harboured in the country, they would arrest the party, and deliver him to the justices or sheriff; that they themselves would not receive any stranger into their houses by night; or, if they did, that they would not permit him to go before it was broad day, and then not without the testimony of three or four neighbours (a).

After this conference with the principal people of the county, the justices, we may suppose, returned into the open court, to attend to the rest of the business. The next step was the calling over the serjeants and bailiffs of hundreds, each of whom was to swear to chuse out of his hundred four knights, who were to come immediately before the justices, and make oath that they would elect twelve other knights; or, if knights could not be had, twelve *liberos et legales homines*, who were no appellors, nor appealed, nor suspected of breach ^{The jury.} of the peace, or the death of a man, or other offences, and such as were well qualified to dispatch the king's business on that occasion. The names of these twelve were immediately to be inserted in a schedule, which was to be

(a) Bract. 115. b. 116.

delivered to the justices. As the twelve of each hundred appeared, one of them took the following oath: "Hear this, ye justices, that I will speak the truth of that, which you shall command me on the part of our lord the king; nor will I, for any thing, omit so to do, according to my ability; so help me God, and these holy gospels;" after which every one was to swear separately for himself, "The oath which John here has taken, I will keep on my part; so help me God, and these holy gospels." When they had all sworn in the above manner, the *capitula itineris* were read to them in order; and when those were gone through, the justices informed them, that they were to answer in their verdict, separately and distinctly, upon every article thereof, and were to have their answer there at a certain day. Besides this, they were to be told, privately, that if any knew of any suspected persons in his hundred, he should instantly take them if they could be found; if not, their names were to be conveyed to the justices, in a schedule, privately, that they might not have notice to escape; upon which the sheriff would be commanded to take them, and bring them before the justices.

These articles of inquiry, called the *capitula itineris*, were not always the same, but differed as times or places required. We have before given some specimens of the *capitula* in the preceding reigns(a); the following are the articles of inquiry mentioned in Bracton. The first was of the old pleas of the crown begun before the former justices, but not determined; then of the new pleas of the crown that had arisen since (for such as had happened before the former iter, and had not been prosecuted, could not now be inquired of; and, should any one be charged with an old crime, he might plead such matter in discharge of himself); of the perjury of jurors at a former iter; of those *in misericordia regis*, but who had not been yet

(a) Vid. ant. Vol. I. 202.

amerced; of the king's wards; his vacant churches; his estreats; his serjeanties, and purprestures on his land; of measures and weights; of sheriffs and other bailiffs who held pleas of the crown; of usurers deceased, and their chattels; of the chattels of Jews killed; of counterfeiter of the coin; of burglars, fugitives, outlaws; of those who had not made suit after offenders; of new pretended customs; of rewards for releasing distresses; of those who held plea of provors without lawful authority; of escape of thieves; of wreck; of offenders in parks; *de rapinis & prisis*; of those who, having no liberty, obstructed the entrance of bailiffs on their land; of bailiffs and sheriffs giving favour, or holding plea *de vetito namio* without the king's writ, or fomenting suits, or taking bribes; of hundreds lett to farm, and their value; of sheriffs and bailiffs discharging on pledges persons excused of the death of a man, for money, or imprisoning those indicted of larceny, who were by law repleviable, or raising amercements, or making unlawful distresses; of such who did not produce those they had been pledged for before the justices; of warrens made without lawful authority; of treasure trove; of felons hanged, and the value of their lands and goods. These seem to have been the principal and most usual articles to be enquired of by the jurors at this time(a).

Having thus shewn the manner in which business was begun in the eyre, we shall for the present take leave of it, and consider the nature of crimes, and the course of bringing criminals to justice. This will carry us to the inferior courts of the sheriff and coroners, and at length bring us back to the eyre, where these matters were finally determined.

The crime which first claims our regard, Of læse-
is that of *læse-majesty*; which contained in majesty.
it several species of offence. One of them has been before described from Glanville (b); and was, when a person

(a) Braet. 116. 116. b. 117. 117. b.

(b) Vid. ant. Vol. I. 195

attempted any thing against the king's life, or to raise sedition against him, or in the army, though what was designed was not brought to effect; and all those who gave aid, counsel, or consent thereto, were equally involved in the guilt. A charge of this kind might be brought by any one, even by an infant; but the party accused, in such case, was to be attached till the infant came of age. The accuser, however, must himself be no offender; for if he was an acknowledged thief, or outlawed, or convicted, or, says Bracton, *to be convicted of any sort of felony*, he was not admitted to accuse another; nor were accomplices in the guilt ever admitted to bring a charge of læse-majesty. The law required an accusation of this crime to be made with all expedition. A person, who knew another to be guilty, was to go instantly, says Bracton, to the king himself, if he could; or send, if he could not go; or to some *familiaris* of the king; and relate the whole matter. This was to be done instantly; for, according to the same authority, he was not to stay two nights nor two days in one place, nor to attend the most urgent business of his own; he was hardly permitted, says he, to turn his head behind him; and the dissembling the charge for a time, by silence, made him a sort of accomplice, and betrayer of the king; and afterwards, should he prefer his accusation, he could not by law be heard, unless he could shew some very good reason for his delay (*a*).

If this charge was made upon public fame, the loss of life and the forfeiture of his inheritance followed, as in case of an appeal; though in Glanville's time it seemed to have been otherwise (*b*). If the prosecution was by an appellor, he was to state the charge, with the time, hour, and place; and conclude, *et hoc ego, juxta considerationem curiæ, disrationare paratus sum*. Upon this the duel was awarded, if the appellee simply denied the fact;

(*a*) Bract. 118. b.

(*b*) Vid. ant. Vol. I. 197.

but he might, if he pleased, make certain answers, which must be determined before the duel could be awarded. He might object any of the points before-mentioned, as requisite to qualify a person to make the charge; to all which the appellor might reply, and the appeal might be decided on such collateral inquiry (a).

It is made a question by Bracton, who was ^{Who to judge} to sit in judgment upon, and decide such ^{thereof} points of law. It could not be the king, says our author, for then he would be both prosecutor and judge; nor his justices, for they represented him; Bracton therefore thinks, that the *curia et pares*, that is, the justices together with the *pares*, were to be judges in all cases of life and limb, and disherison of heir. There could be no doubt, especially since *Magna Charta*, whether the *pares regni* were to be tried by *their* peers; Bracton therefore must here be understood as speaking of commoners, to whom the *sectatores* of the county and other courts were *pares*, and judges in such courts. But these we have seen were never *pares curiæ* in the king's courts. And indeed the manner in which he gives this opinion, is an evident mark of a different usage having subsisted, and that it was not precisely agreed in what instances to recur to this ancient common-law method. This idea of Bracton might be executed by associating certain persons of the county in the commission with the justices, (as we have seen was required to be done in the commission of assize) (b), who would be thus at once constituted *pares curiæ*. The remainder of this passage in our author, as it contains the opinion then entertained upon this point and the award of the duel, deserves notice. There was to be a distinction according to the fact on which the appeal was grounded, whether it was felony or trespass; for every trespass, says he, is not felony, though every felony contain in it a trespass. If it was a felony, then the words of the appeal were to be weighed, and the matter examined

(a) Bract. 119.

(b) Vid. ant. vol. I. 246.

into; as whether the appellee would wage the duel, or plead some of the points above-mentioned to bar the appeal; and if the duel had been waged without such examination, it might be *devadiatum*, or retracted. If it turned out to be rather a trespass than a felony, the duel was barred; and then it was to be enquired of what degree the trespass was. If it was *levis*, and the judgment would be only for a slight pecuniary penalty, the justices might judge of it without the *pares*; but if it was *gravis*, and very near to that which would have produced a disherison, and actually required a redemption to be paid, there the *pares* were to be associated to the justices, lest the king, by himself or his justices, without the *pares*, should be both *actor* and *judex* (a).

At a time when offences of læse-majesty were so undefined, and accusations of that crime were large and general, it was almost always necessary to examine the matter before it went to the decision of the duel, to see whether it was a felony or a trespass only (as either of those might be an offence of læse-majesty), and whether that or some other was the proper mode of trial. The associating certain *pares curiæ*, as a check upon the justices, was a refinement which, however, does not seem to have been the established and universal practice: for the opinion is advanced by Bracton with a sort of apprehension that every one did not agree with him; *sine præjudicio melioris sententiæ* (b). We see that læse-majesty was not the description of any specific offence, which was attended with a punishment peculiar to itself; except that when it was also a felony, the forfeiture went to the king, and not to the lord.

Another species of læse-majesty, and that which, as it produced death, may be reckoned among the higher species, was the *crimen falsi*; at least that sort of falsification that affected the king's crown; as falsifying the king's seal in signing charters or writs; or making charters

(a) Bract, 119.

(b) Ibid. 119. b.

or writs, and putting forged seals thereto. Another offence which was a sort of *crimen falsi*, and which affected the king's crown, and was followed by death, was the making of false money, or clipping that which was good. This is the first mention of coining being treated as a crime of læse-majesty (a).

The fraudulent concealment of treasure trove is considered by Bracton, as it had been by Glanville (b), to be a high presumption against the king's crown and dignity: this was to be enquired of by the country. Treasure which was found in the earth without an owner, belonged to the king, as being *nullius in bonis*. So was *derelictum*, or *wreck of the sea*, which being thrown overboard was abandoned by the owner; though *wreck* more properly meant, what was cast on shore after the destruction of a ship, where there appeared no marks by which the owner might be known, as a dog, or the like. There is no mention that an infringement of this royalty was deemed a crime of læse-majesty, though that of treasure trove was. To violate any of the laws *enacted and sworn to* (c) for the public benefit of the realm, was considered as a high presumption against the crown and dignity of the king; in which case there was a corporal punishment inflicted on the transgressor, as the pillory, or tumbrell, with a consequent infamy, and sometimes a pecuniary penalty and abjuration from the town where the offender lived, according to the nature of the offence, and, probably our author means, according to the particular directions of the act which had been violated (d): though it may be observed, that it does not appear to have been usual in those times, nor long after, to affix in the body of an act, these or any other *specific* punishment to the breach of it.

The crime of homicide partly concerned the king, whose peace was infringed, and partly, Of homicide.

(a) Bract. 119. b. (b) Vid. ant. vol. I. 198. (c) *Leges, statuta, et jurata*. (d) Bract. 120.

as Bracton expresses it, the person who was killed. Homicide might be committed from four causes; it might be *ex justitiâ*, *necessitate*, *casu*, or *voluntate*. The first was, when any one was killed by sentence of a court, and in the forms of law; which was so far from an offence, as to be highly justifiable; though it became an offence, if the due order and course of the law was not observed. Homicide by necessity was, when it was inevitably necessary to kill the party, in order to defend one's person and property; for if the necessity was not inevitable, the fact was accompanied with the guilt of homicide. Accidental homicide, or *per infortunium*, was, when a stone was thrown at a bird, or some other animal, and a person passing by unexpectedly was struck and killed by it; or when a tree, which was cutting down, fell upon somebody. But here a distinction was made between a lawful and an unlawful act; as, if the stone was thrown towards a place where people were accustomed to frequent, or not; if a person when cutting down the tree, called out, and gave notice, in proper and reasonable time, for any one to escape. So if an act was, in the common course of things, lawful and proper; as if a master did not exceed the usual bounds in correcting his scholar, whatever was the event, no homicide could be imputed. If the act was unlawful, or, being lawful, was done without due caution, it would be imputed as a crime. Voluntary homicide was, where any one, of certain knowledge, and by a premeditated assault, in anger, or hatred, or for gain, killed any one, *nequiter & in feloniam*, against the king's peace. This crime was sometimes committed in the presence of others, sometimes without any one seeing it, and then it was called *murdrum*, as in Glanville's time (a).

It was held at this time, that if, after the foetus was formed and animated, any one struck a woman and so caused an abortion, or even if any thing was given to

(a) Vid. ant. vol. I. 198.

procure an abortion, it was homicide. If a quarrel ensued between several persons, and one was killed, though the person who struck the blow was not known, yet they who held him while he was struck, those who came with a bad intention, and even those who only came to counsel and assist, were all guilty of homicide; nor was he deemed entirely guiltless who could have rescued the deceased from death, and neglected so to do (a). It was held, that an infant and a madman should be excused from the pain of homicide (b).

In the two following cases the law is thus laid down by Bracton. If a man killed a thief by night, the party killing would not be liable to any punishment, provided he could not have saved himself without so doing. If a person killed one who was a *hamsoken*, as they then called it, that is, a housebreaker, and the killer was standing on his defence, he was not to be prosecuted (c).

As a person committed felony in killing another, so might he commit felony in killing himself; and this was called *felonia de seipso*. Thus if a person charged with a crime, as one taken for homicide, or in manifest theft, or outlawed, or, in short, apprehended for any crime, and, through fear of its consequences, killed himself; such a person was considered as corrupted in blood, for it was taken as amounting, in effect, to a conviction. But those who laid violent hands on themselves, when under no charge for any offence, were not to forfeit their goods nor inheritance like the former, because, as there was no precedent felony, there could not be a constructive conviction; though, says Bracton (in contradiction, as it should seem, to what went before), if a person, *tædio vitæ, vel impatientiâ doloris*, killed himself, however his inheritance might be saved, he yet forfeited his moveables. Again, if a man in the endeavour to do some hurt to another, killed himself, the felonious design he meditated against

(a) Bract. 120. b. 121.

(b) Ibid. 136. b.

(c) Ibid. 144. b.

another would be punished in himself, and his inheritance was by law forfeited. Should a madman or an infant commit any felony *de seipso*, they were exempted from all sorts of forfeiture, unless, indeed, a madman did the fact in some lucid interval (a).

The office of the coroners. Having said thus much of the crime of homicide, we shall make a little digression to examine the method directed by the law to be pursued on the death of a man, in order to bring the offenders to justice. The principal agents in this were the *coroners*, who were probably so called, from the part they took in the prosecution of those offences which concerned the *coronam regis*. It was the duty of the coroners, as soon as they were called upon by the king's bailiff, or some good men of the country, to go to the body of the deceased in all cases, whether the death was occasioned by a wound, by drowning, by suffocation, by accident, or by whatsoever cause, if it was a sudden death; and as they went thither, they were to command the four, five, or six next towns to appear before them, and upon their oath make inquisition concerning the death. They were to enquire how the death happened, who were present, who were principals, who were any ways assisting or consenting thereto. Those who were in this manner found guilty, were immediately, if present, to be delivered to the sheriff, and committed to prison; and all those who were found in the house with the deceased, though not guilty, were to be attached till the coming of the justices, and their names enrolled in the coroners rolls. If the body was found in a field, the finder, in like manner, was to be attached. They were to enquire whether the deceased was known, where he lodged the last night, and the host and all his family were then likewise to be attached. If any one fled on account of the death, and was suspected of being guilty, the coroners were to go to his house and enquire

(a) Bract. 150.

what chattels, corn, and land he had, and cause it all to be appraised, and delivered to the township which was to answer for the value thereof before the justices. After all this, and not before, the body might be buried; and if it was buried without such inquisition and view of the coroners, the whole township was to be *in misericordia*. If a person was drowned, the boat out of which he fell was to be appraised; and, in all cases, the thing which was the *causa mortis* was to be valued, and forfeited as a *deodand* to the king. Even if the inquisition did not find it to be felony, but sudden or accidental death, yet the finder, with all who were in his company, were to be attached till the coming of the justices (a).

It was the business of the coroners to make like inquisition concerning treasure trove. If any one was charged with being the finder, or if a presumption was raised by expensive living, or otherwise, such person was to be attached by four or six pledges, and more, if they could be had. Again, in case of *raptus virginum*, if it was followed up with those circumstances of instant prosecution that are mentioned before from Glanville (b), the coroners, to whom the complaint was made, were to attach the offender by four or six pledges, or, if there were no very strong marks of presumptive guilt, only by two (c).

The coroners had a like office in appeals *de pace et plagis*. They were in the first place to inspect the wound, and if it was mortal, and the appellee could be found, he was to be taken and detained till the party recovered; and if he died, to be thrown into prison: but, in the former case, the appellee might be attached by four, or six, or more pledges, according to the degree of the wound; and if it was a mayhem, certainly by more, that the security might be good; if he was a stranger, or could find no security, the gaol, says Bracton, was to be his pledge. The size of the wound, its length and depth, were to be

(a) Bract. 121, b. 122.

(b) Vid. ant. vol. I. 200.

(c) Bract. 122.

measured, and that, together with the part of the body, and the arms it was made with, the coroner was to see described on a roll, with the attestation of the sheriff, if the inquisition was taken in his presence, or in the county (a). Thus the coroners were the first spring in criminal prosecutions that were brought by appeal.

Imprisonment
and bail.

To return to the prosecution for homicide. If persons were committed to prison for the death of a man, they could be delivered only in one of these three ways: they might be discharged on pledges by the king's command; they might be delivered by judgment of acquittal; or, if they were clerks, they might be claimed by the ecclesiastical power. The way in which the king might deliver them was by the proceeding on the writ *de odio et atia*, which was mentioned in the observations upon *Magna Charta* (b). This was a writ commanding the sheriff *per probos et legales, &c. inquiras, utrum A. &c. rectatus, vel appellatus sit, &c. odio et atia, vel eò quòd inde culpabilis sit, &c.* Upon the return of guilty, he was not to be discharged on bail; but if it was returned that he was imprisoned *odio et atia*, he was bailed till the coming of the justices. This was effected by another writ to the sheriff: *Præcipimus, &c. si A. &c. inveni-
nerit tibi 12 probos et legales homines de com. qui man-
cipiant habendi eum ad primam assisam, &c. tunc eum
TRADAS IN BALLIUM illis 12 probis, &c.* If the bailiff of a liberty would not admit a person to bail according to the sheriff's direction, there issued a writ to the sheriff, commanding him, *non obstante libertate*, to enter and make deliverance himself (c).

If a clerk imprisoned was demanded by the ordinary, he was to be instantly delivered, without any inquisition being taken; he was not, however, to be let loose upon the country, but to be kept in safe custody, either in the prison of the bishop, or, if the ordinary pleased, in that of the

(a) Bract. 122. b. (b) Vid. ant. vol. I. 252. (c) Bract. 122. b. 123. a. b.

king, till he had purged himself from the offence with which he was charged, or had failed in making his purgation, and had been accordingly degraded. Sometimes the ordinary would not put a clerk to purge himself, unless a fresh charge was brought in the ecclesiastical court; in such case, a writ might be had to require him to proceed therein.

These were two of the ways in which a person imprisoned for homicide might be delivered; the third was by judgment of acquittal, which needs no explanation. In all other cases, the law was, that persons might be discharged on bail; and even in these cases, the sheriff had such a discretion allowed him, that the liberty of persons charged with crimes depended wholly upon him. He was to judge from the nature of the fact, the person's circumstances, character, and the like; and accordingly, as he thought fit, was to commit to prison, or admit to bail. This became peculiarly hard from a piece of law then prevailing, namely, that breach of prison, however small the offence for which the party was committed, and though he was innocent, should be punished capitally; and this is one instance in which the law gave an entire indemnity to any of the accomplices who would discover the design (a).

In the above cases, we have supposed the offenders were all forthcoming; but when they absented themselves immediately after the fact, the process was to raise *hutesium*, or hue and cry, and a *secta* or suit was made after them from town to town till they were taken, otherwise the township, where the fact happened, would be *in misericordia*. This hue and cry and suit was made in a different way, according to the custom of different places (b). The suit was to be carried further than the search from town to town, for the offender was to be proclaimed in the county; a method which had been adopted in mercy to the absent

(a) Bract. 124.

(b) Ibid.

fugitive, who, it should seem, by the old law was considered as an outlaw upon his flight merely, without being proclaimed with this formality in the county court (a). The law now was, that sentence should not be pronounced against the party till suit was made in this manner in the county court, and he had had this warning to appear and purge himself. The time given for this was the space of five months; that is, he was to appear at the fifth county court, to answer for the offence with which he was charged; and if he did not, then he was adjudged an outlaw, and suffered all the consequences of such a sentence. If he appeared before that period, he saved the forfeiture of his land, but still forfeited his goods, on account of his flight, notwithstanding he might be innocent of the crime.

But the criminal could not be prosecuted to outlawry in this way, unless a person stood forth to make the suit, who could speak *de visu et auditu* that the party had fled; and who would call upon him to return in the king's peace, or require that he might, at the proper time, be outlawed; and then he was to state the crime, as if the party was present, and the appeal was going to be heard; and he was to add, that, should he appear, he would repeat the charge he had made. Thus not only *suit*, but the *appeal* was actually to be made, before the fugitive could be outlawed (b).

It should here be recollected, that a *suit* and *appeal*, when for homicide, could not be prosecuted by every one, but only by one who was of the blood of the deceased; and that the nearest was preferred to the more remote. Yet some strangers were admitted to make *suit*; as one who was bound by homage to the deceased; or if he was of the *manupastus*, or family of the deceased person, or could say that he had received at the time of the killing any

(a) Bract. 125

(b) Ibid. 124.

wound, or restraint, or the like. A minor might make suit, and appeal; but a woman, as we have before seen from Glanville and *Magna Charta*(a), could not have an appeal except *de morte viri inter brachia sua interfecti*, as Bracton expresses it. It should be observed, that suit could not be made by attorney, if the party was able himself to prosecute(b). If a sheriff proceeded to demand any one, without a person appearing to make suit, or without the command of the justices (who, we shall presently see, could make suit for the king in case of any intermission by the appellor) he was *in misericordia*.

Respecting the persons who might be outlawed; every male who was twelve years old might be outlawed, because a person of that age ought to be in some *decenna*, or, which answered the same purpose, in some *manupastus*; but those of inferior age, as they were not *sub lege*, could not properly be ever said to be *outlawed*, or put out of the law: the same of a woman, who, as she also was never *in laughe*, that is in frankpledge, or in a *decenna*, could not be outlawed; but if she fled upon commission of any felony, she might be *wayviata*, as they called it, that is, be esteemed as one deserted and forlorn, which condition corresponded with that of outlawry.

The time necessary to complete the outlawry was this: the offender was to be demanded at four counties, from county to county, till he was outlawed; but at the first county there was only to be, what they termed, *simplex vocatio*; and that was not computed towards the time as one of the four counties; so that in truth five were to pass before the outlawry was had; the outlawry therefore was to be at the fourth of those after the *simplex vocatio*. At the fifth, or, as they called it, the fourth county no *essoir* or excuse could be received, nor was it sufficient that any one would engage to produce him at the next county; for

(a) Vid. ant. vol. I. 251.

(b) Bract. 124.

this would be protracting the time of outlawry *ad infinitum*. But at any of the preceding counties, an engagement to produce the fugitive would be admitted till the fifth county; and the fugitive had till the fifth county to render himself to prison, or defend himself and purge his innocence; but after that time, the outlawry stood in the way, and he could not return till that was removed by the mercy of the king.

If there was any delay in making the suit; as if hue and cry had not been raised, if the party had not been pursued from town to town, nor to the sheriff, nor to the coroner, nor at the first county; yet if a person chose to commence the suit afterwards, he might, as there was no one who had any right to object such deficiency in the proceeding. Again, if the suit had been begun in time, but a county court was suffered to pass without continuing it, the suit might, nevertheless, be resumed, so as the lapsed county was not reckoned towards the time of computing the outlawry; and so of any greater omission; which if rectified was always done with a view rather to favour the appellee than to oppress him. If upon any of the like failures of suit it was not again resumed, the county had no power to proceed to outlawry, but they were to wait for the coming of the justices; whose office it was, among other things, to give direction to the sheriff to proceed to outlawry, *ex parte regis*, in default of the appellor.

At the king's suit. Thus could the justices command the sheriff to proceed to outlawry, where there was any slackness in the party who had commenced the suit. They might likewise, in cases where no suit had been commenced by an appellor, command the sheriff to proceed to outlaw a person charged before them of any crime; but this could not be done till an inquisition had been taken, to try whether he was guilty or not. If the inquisition found him guilty, then the sheriff was commanded to proceed; otherwise no direction was given about it. The sense of this

was, that a reasonable presumption of the party's guilt should be raised before he was made liable to the penalty of an outlawry. The presumption founded upon a suit commenced, though intermitted, was thought sufficient to warrant the justices to direct a continuance of it; and if no suit had been commenced, a sufficient presumption was raised in this manner by the verdict of an inquisition^(a). This was the course in which criminals might be prosecuted at the king's suit, in default of the suit of the party.

If the due order and formality was observed in proceeding to outlawry, it could be removed no otherwise than by the king's pardon, even though there should afterwards appear to have been no crime committed, as if the person supposed to be killed should be produced alive. But should any of the necessary requisites towards the outlawry be wanting, it became void. Many were the instances in which this might happen. An out-^{Reversal of}lawry was void, if it had been without suit, or ^{outlawry.} without a continuance of the suit; if it was proceeded in after the iter of the justices, without authority from them; or if it was commenced at the suit of the king, without a previous inquisition; if it was pronounced any where than within the county; supposing it for London, if it was pronounced out of the husting; if the offender died before the outlawry; if the person supposed to be killed appeared alive before the outlawry pronounced; if the prosecutor died before the outlawry pronounced; if the accused had answered for the same offence in some other county; if he had surrendered himself to prison before the outlawry; if he had submitted to banishment by consent of the king; if the outlawry was pronounced before the legal time was elapsed; if he was under twelve years of age; in all such cases the outlawry would be

(a) Bract. 126.

declared void, upon the accused coming in to stand a trial for the offence (a).

Process of outlawry lay in every case which was charged to be against the king's peace; but not in matters which concerned the sheriff's peace only (b). Outlawry lay not only against those guilty of the *fact*, or, as they are more commonly called, principals, but also against those guilty of *force*, or, as they were afterwards called, accessories; and if neither of them appeared, the proceeding would be against both at the same time; only at the last county, judgment was first to be pronounced against the principal, and then against the accessory, on the same day. Some thought it ought not to be even on the same day; and others said, that the accessory was not even to be demanded till the principal was first convicted. But Bracton thought, that should they both fly, they ought to be proceeded against together, as above mentioned; only, should the accessory appear alone, then indeed he was not to be proceeded against till the principal was convicted; because, by his appearance, a presumption was raised of his innocence.

When a person was outlawed, every one who knowingly fed, received, or harboured him, was subject to the same penalty as the outlaw himself; for which reason an outlaw had in earlier times been called a *frendlesman*; one who could not, by law, have a friend. An outlaw was said *caput gerere lupinum*; by which it was not meant that any one might knock him on the head, as has been falsely imagined, but only in case he would not surrender himself peaceably, when taken; for if he made no attempt to fly, his death would be punished as that of any other man: though it seems, that in the counties of Hereford and Gloucester, in the neighbourhood of the marches of Wales, outlaws

(a) Bract. 127. a. b.

(b) Ibid. 127. b.

were in all cases considered literally as *capita lupina* (a). If an outlaw returned without the king's pardon, he might be executed without further legal enquiry; for, says Bracton, *Iustum est iudicium, quòd sine lege et iudicio pereat, qui secundum legem vivere recusat* (b). An outlaw forfeited every thing he had, whether it was in right or in possession; all obligations and contracts were dissolved, and all rights of action; and, like a judgment of felony, it operated with a retrospect to make void all gifts and sales made after the felony committed. The manner in which the forfeiture was distributed was this: all chattels went to the king; the lands were taken into the king's hands for a year and a day, and after that (unless holden *in capite*) they reverted to the lord of whom they were holden. The king's year and day had grown into a regular casualty, in lieu of the singular species of punishment he might inflict by destroying houses, gardens, and meadows; and even the year and day used sometimes to be released upon the lord's paying a fine (c).

When a person had been outlawed according to all the forms of law, he could only be restored, as was said before, by the king's pardon; and that restored him only to the king's peace, so as to enable him to appear without hazard to his person: all the forfeitures remained, and every other consequence of the outlawry. For though the king might remit his own claims, he could not release or disturb the interest of others (d). This pardon, however, as it only removed the outlawry, still left the party to be proceeded against by the appellor for the offence with which he was charged (e).

In such instances, where the king would have pardoned a conviction of the fact, he would readily pardon the outlawry; as in case of homicide *per infortunium*, or *se de-*

(a) Bract. 128. b.
131. 132. a. b.

(b) Ibid. 129.
(c) Ibid. 133. b.

(c) Ibid. 129.

(d) Bract.

fendendo ; and in general where there was really no offence committed. Process of outlawry would not lie against a clerk, any more than judgment of death(a).

Of *murdrum*.

We have hitherto spoken of such homicide, as had been committed in the presence of persons, who could testify concerning it. There was another degree of homicide, which was, when any one was killed, *nullo sciente vel vidente, præter solum interfectorem et suos coadjutores et fautores, et ita quòd statim assequatur clamor popularis* ; this was called *murdrum*, and had been described in the same manner by Glanville(b). In this case it was presumed, according to the law of William the Conqueror, that the party killed was a Frenchman, unless *Englshery*, that is, his being an Englishman, was proved by the relations, and presented before the justices(c).

There were many cases where a country was excused from paying a fine for this *murdrum*. One was, where the killer, whether taken or not, was known ; for then the felony might be prosecuted, either by suit or inquisition, to outlawry ; much more if the killer was taken, for then he might be punished : so if the party survived some days, for he might discover the offender, and declare whether he was an Englishman or a Frenchman : if any had fled to a church for the death, and had confessed it : so where the person was killed *per infortunium*, as by suffocation, drowning, or the like accident, though in some places the custom was otherwise. In all cases but the preceding, if the killer was not known (whether the person slain was English or not) a *murdrum* was to be paid, unless *Englshery* was duly presented. This presentment was to be before the coroners, at the very time they made inquisition of the death. The proof was different in different counties : in some, the fact was presented by two males on the part of the father,

(a) Bract. 134. b.

(b) Vid. ant. vol. I. 198.

(c) Bract. 134. b.

and two females on the part of the mother, of the nearest of kin to the deceased; in some counties, by one of each; in others differently. The names of these persons were to be inrolled in the rolls of the coroners, and to be presented before the justices itinerant. If there was any doubt, either of what the relations alledged, or whether they were related to the party, the *Englishery* was to be declared *per patriam* (a).

If an offender fled to a privileged place, he might either surrender himself to justice, Abjuration. or abjure the realm of England. If he chose the latter, a certain number of days were to be allowed him to reach any port he should chuse, to which he was to make the best of his way, never leaving the king's highway, nor delaying two nights at a place; but he was to keep on, so as to arrive at the port within the stated time, and transport himself as soon as possible. Before he set out he was to bind himself by an oath, taken before the coroners or the justices, that he would leave the kingdom of England, and never return to it but by permission of the king. This oath ought to be taken within forty days, from the offender's first going to the privileged place; that being the space of time allowed by the law to sanctuary-persons, and particularly prescribed by the Constitutions of Clarendon (b), as the period within which persons acquitted by the ordeal should abjure. However, if the person flying to sanctuary would not leave it at the appointed time, he could not be removed from thence by lay hands; but it rested with the ordinary of the place to remove him, if he thought fit. Should the bishop scruple to infringe the privilege of sanctuary (a scruple which could very rarely be removed in the mind of a churchman), there remained nothing but to starve him out (c). Thus stood the law of sanctuary and abjuration.

(a) Bract. 134, b. 135. a. b. (b) Vid. ant. vol. I. 193. (c) Bract. 135, b. 136.

If a person was in custody for a felony, he was not to be stript immediately of his goods and chattels, but as soon as he was taken, they were to be appraised by the guardians of the pleas of the crown, the bailiffs, and other lawful men, and to be safely kept by the bailiffs till the prisoner was either convicted or acquitted. In the mean time, he was to have the use of them to provide himself with necessaries; and if they were taken from him, he might have a writ, commanding the sheriff to see it ordered in the above manner. It was a rule, that a prisoner should not be brought before the justices *ligatis manibus*, with his hands tied; though sometimes, to prevent escapes, they might bind his feet (*a*).

Having thus brought the prisoner into court, the next step would be to state the words of the appeal, with the defence of the appellee, and the joining issue on the fact, and going to trial; but before we come to speak so particularly of this proceeding, it will be proper to premise somewhat concerning the alterations which had taken place during this reign in the modes of trial in criminal inquiries. The trial by ordeal had continued till the judgments of councils (*b*) and the interference of the clergy at length prevailed against it. In the third year of this reign, direction was given to the justices itinerant for the northern counties (and probably to the others likewise) not to try persons charged with robbery, murder, or other such crimes, by fire and water; but, for the present, till further provision could be made, to keep them in prison under safe custody, so, however, as not to endanger them in life or limb; and for those who were charged with inferior offences, to cause them to abjure the realm (*c*). What further provision was made, as thereby promised, does not appear; but we find this order of council had such an influence towards

(*a*) Bract. 136. b. 137. (*b*) Dec. pars 2. caus. 2. quest. 5. chap. 20.
 (*c*) Dugd. Ori. Jur. 87.

abolishing this superstition, that it went quite out of use by the time of Bracton, who makes no mention of it in his book. As to the trial by duel, it should seem that some direction, like that just mentioned, had been made, which gave to a party appealed an election to defend himself *per corpus* or *per patriam*; a regulation which, no doubt, was framed in analogy with the institution of the assise in lieu of the duel, in a writ of right; and as in that, so here, if the appellee put himself upon the country, he could not afterwards defend himself by duel, nor *vice versa* (a).

This option of trial was not so wholly left to the party appealed, but that the justices The duel. assumed a power of controul in certain cases of a very particular nature; and directed the one or the other, as it seemed to them best suited to the matter of enquiry. Thus where a person was poisoned, the appellee had no election, but was compelled to defend himself *per corpus*; because, says Bracton, the *patria* could know nothing of a concealed fact, like this, but by conjecture or by hearsay, which would be no proof, either for the appellor or the appellee. Again, some cases were held so clear, as to stand in need of neither; as, where a person was found near the deceased with a drawn knife; where a person slept in the same house with the deceased, and raised no hue and cry. In these and the like cases of violent presumption, the appellee was not admitted to defend himself either *per corpus* or *per patriam*, but such a manifest circumstance was considered as a conviction of the fact (b).

In all appeals of felony it was required, that the year, day, hour, and place, should be stated precisely; and it was to be charged *de visu et auditu*, upon the testimony of the party's own senses. The form of Appeal of homicide. an appeal of homicide was as follows: *A. appellat B. de morte C. fratris sui, quòd sicut ipse A.*

(a) Bract. 137.

(b) Ibid. 137. a. b.

et C. frater suus essent in pace Dei et domini regis apud such a place, faciendo such a thing, or transeundo from such a place to such a place, on such a day, year, and hour, venit idem, B. with such a one, et nequiter, et in feloniam, et in assultu premeditato, et contra pacem domini regis ei datam, fecit idem B. prædicto fratri suo C. unam plagam mortalem in capite quodam gladio, ita quòd obiit infra triduum de plagâ illâ; and then concluded thus: Et quòd fecit hoc nequiter, et in feloniam, et contra pacem domini regis, offert se disrationare versus eum ubicunque per corpus suum; sicut ille qui præsens fuit, et hoc vidit, et sicut curia domini regis consideraverit, et si de eo malè contigerit, per corpus of such a one, fratris sui, or parentis C. qui similiter hoc offert disrationare per corpus suum, sicut curia consideraverit (a). This was the form of an appeal against the principal. An appeal against an accessory, or one guilty of force, as they called it, was thus: *A. appellat B. de fortiâ, quòd cum ipse et C. frater suus essent, &c. venit idem D. cum prædicto B. et cum aliis, naming them, et tenuit ipsum C. fratrem suum, quamdiu ipse B. interfecit eum; et quòd hoc fecit nequiter, &c.* After this the appellee made his defence, in this way: *Et B. venit, et defendit omnem feloniam, et pacem domini regis infractam, et quicquid est contra pacem domini regis, et mortem, and every thing charged in the appeal; and concluded with putting himself upon the country, or defending himself per corpus; et quòd idem inde culpabilis non sit, ponit se super patriam de bono et malo, if he chose that trial; or paratus est se defendere versus eum per corpus suum, sicut curia domini regis consideraverit.* The appellee was compelled to name one or other of these trials; for if he had said simply, *quòd velit se defendere, sicut curia domini regis consideraverit*, it would have been no defence at all (b); and accordingly, we may suppose, the appeal would have been taken *pro confesso*; for the court were not to

(a) Bract. 138.

(b) Ibid. 138. b.

instruct him how he was to defend himself. But if he had said, *paratus sum defendere, vel per corpus meum, vel per patriam, sicut curia consideraverit*, it should seem, says Bracton, that he thereby gave up his election; and then, we suppose, the court would refer it to the more rational trial, that by jury (a).

If he made choice of the trial *per patriam*, he was not to prefer the *patria* of any hundred he liked; but that was to be determined by the judge, who might assign which twelve he pleased, of those returned for each hundred. This practice was in order to guard against partiality and collusion; for, says Bracton, a man might have lived very reputably in one *patria*, and not so in another. If he had chosen the defence *per corpus*, the justices, before they suffered the duel to commence, were to examine into the circumstances of the fact, lest it might be some trifling trespass, in which the duel would not lie: a laudable caution to prevent the unnecessary hazard of life in that barbarous trial (b).

But many exceptions might be made to the appeal, which would supersede the necessity of recurring to either of these trials. These were either such as were general, and were equally decisive in all appeals; or such as were specially appropriated to particular prosecutions. Of the former kind were the following: that suit had not been properly made; that the coroners' roll and the appeal made in court did not agree; that the coroners' and sheriffs' rolls varied from each other; that the appellee had been already appealed and acquitted of the fact; that an iter had intervened since the fact, without any prosecution commenced(c); that the appeal was brought *per odium et atiam*;

Exceptions
thereto.

(a) Perhaps this might be the origin of the modern form in which a prisoner puts himself on trial—*by God and my country*—though now the *or* is changed to *and*; the former signifying the same as *per corpus*, which was always considered as an appeal to *Heaven*.

(b) Bract. 138. b.

(c) Ibid. 139. b. 140. a. b.

that it would not lie between the appellor and appellee, being lord and tenant, or lord and villain; that there was no mention in the appeal *de visu et auditu*; that there was a variation in the name; that the appellor had once made a *retraxit* of his suit; that the appellor was a manifest traitor convict, or a thief, and provor; that the fact was not laid *de pace domini regis*, but *de pace justitiarum*, or *de pace vicecomitis*; that it was not laid to be a felony (a); that the appellor was a clerk. The appeal might also be deferred for a time, by alledging the minority of either the appellor or appellee (b).

If none of these exceptions could be made and supported, the duel might be waged. We have seen in what manner a right to land was tried by duel (c). We have now an opportunity of relating the method of ordering this proceeding in an appeal. When the duel was waged, the appellee first gave security to defend, and then the appellor gave security to maintain the appeal; after which the appellee took an oath, denying the matter of the appeal word for word: "Hear this, O man, whom I hold by the hand, who call yourself John by the name of baptism, that I did not kill your brother, nor gave him a wound with a sort of weapon by which he might be removed further from life, or brought nearer to death; nor did you see this, so help me God, and these holy gospels." This was the form of swearing, with the additional circumstances of time, place, and the like. It seems very remarkable, that any thing should be rested upon the sort of instrument with which a man was killed; but so it was. Bracton says, it might be laid in the appeal as done with any kind *armorum molutorum*; but not with a stick, or stone, or other weapon that could not be said to be *arma moluta*. It may be

(a) Bract. 141.

(b) Ibid. 141. b.

(c) Vid. ant. vol. I. 123.

said, that Bracton states this only as an opinion held by some, *secundum quosdam*; yet he seems to give an absolute opinion, that a wound with a stick or stone would not be properly laid (a).

After this, the appellor swore in maintenance of his appeal thus: "Hear this, O man, whom I hold by the hand, who are called John by the name of baptism, that you are perjured, and therefore perjured, because you wickedly and feloniously did kill C. my brother; and wickedly and feloniously, and with a premeditated assault did give him such a wound, with such a sort of weapon, that he died thereof in three days; and this I saw, so help me God, and these holy gospels:" to which were to be added, as in the former oath, the time, place, name, and the other necessary circumstances, so as to support and cover every thing charged in the appeal. After the oaths were thus taken, the appellee was to be committed to two knights or other lawful men, according to his rank, who were to lead him to the field assigned for the duel; and the appellor in like manner. There they were both to be guarded so that no one might converse with them, till they engaged in the duel. Before they engaged, each was to swear in this manner (b): "Hear this, ye justices, that I have not eat nor drank, *nec aliquis pro me, nec per me propter quod lex Dei deprimi debeat, et lex diaboli exaltari, sic me Deus adjuvet.*" After this a proclamation was made, forbidding all persons, whatever they heard or saw, to move or speak a word, upon pain of imprisonment for a year and a day; and then the appellor and appellee engaged. If the appellor was vanquished, or if the appellee defended himself the whole day till the stars begun to appear, he was acquitted of the appeal; because the appellor had engaged to convict him that day, and had failed. He was also acquitted as against all others who had appealed him

(a) Bract. 138.

(b) Ibid. 138.

of the same fact; as were those likewise who were appealed of *force* or *command*. But if the appellee was vanquished, he suffered capitally, and forfeited every thing from him and his heirs, as was before stated in case of outlawry. Should the appellor, when he came into the field, make a *retraxit* of the appeal, he was to be sent to gaol, and he and his pledges of prosecuting the duel were *in misericordia*. But it was otherwise, if he was vanquished; for though he was to be sent to gaol, he was generally pardoned the *misericordia*, in consideration that he had engaged in maintenance of the king's peace (a).

After the principal was convicted, they might proceed to the duel against the accessory. This might be the next day. Or, if the accessory had not been yet appealed, they might then state an appeal against them, and proceed in like manner as before mentioned in case of principals; and the accessory, if convicted, would suffer as the principal, according to the maxim, *satis occidit qui præcipit*. If any thing happened which prevented the appeal against the accessories, the king might take it up *pro pace sua*; and then the trial would of necessity be *per patriam*; for the duel could not be waged against the king. There were other instances where the duel could not be waged; as, when the appellor was a woman; when the appellor had been maimed, or was above sixty years old; though in this last case he had his election (b). We have seen, in Glanville's time, that there was a different judgment, when the offender failed to purge himself *per legem*, and when he was vanquished in the duel (c). A similar difference seems to have subsisted at this time; for when the king pursued an appeal *pro pace sua*, and convicted the party by the inquest, Bracton doubted what was to be the punishment. Some thought it was to be capital, as it would have been if the appeal had gone on at the suit of the

(a) Bract. 142.

(b) Ibid. 142. b.

(c) Vid. ant. vol. I. 197.

party; others thought, that it was to be only a pecuniary penalty; and yet, where a woman convicted a man of a rape *per patriam*, he suffered as upon an appeal in other cases (a).

We have hitherto been treating of a prosecution when a person chose to stand forth as accuser, and when the king carried on the suit, on the omission or failure of such person in continuing it. It remains now to say something upon the other mode of prosecution, which was when a person was indicted *per famam patriæ*. This was pro- Proceeding *per*
bably no other than the *fama publica* mention- *famam patriæ*.
ed by Glanville (b); which raised a presumption amounting to a conviction, till the party had purged himself from the suspicion thereby thrown upon him: for this, like all other presumptions, was open to a proof or purgation to the contrary. The *fame* which was sufficient to raise this presumption, ought to be such as was entertained by good and grave men, who deserved credit, and not the flying reports of common conversation. Thus, as a person indicted *per famam patriæ* was charged by the *patria*, or twelve jurors, elected in the manner before-mentioned, who had founded the accusation upon their own knowledge or persuasion, collected from observation or report; it became the judge, if he had any doubt, or suspected the jury, to make strict examination into the matter, and ask the twelve, how they learnt what they in their verdict declared concerning the person indicted; and upon their answers he might judge whether the charge was founded in truth or malice (c). Perhaps, says Bracton, some of the jurors might say, that they collected their information from one of their brother-jurors; who, upon being interrogated particularly, might say he had it from such-a-one, and so on, till it was traced to some disreputable person, who deserved no credit. It often happened that these examinations brought to light the iniquity

(a) Bract. 143.

(b) Vid. ant. vol. I. 200.

(c) Bract. 143.

of a charge. It sometimes turned out that an imputation of a crime was contrived to be thrown on a freeholder by his lord, in order to get an escheat; sometimes by a neighbour from other malicious motives.

When this examination had been made in order to proceed to taking the verdict, and giving judgment thereon with more security, then the judge was to inform the party indicted, that, if he entertained suspicion of any of the jurors, he might have them removed: or, if no objection was made to any of them, when the twelve jurors (a) appeared, they were all sworn, either singly, or all together as follows; "Hear this, ye justices, that we will speak the truth of that which you shall require of us on the part of our lord the king, and in nothing will we omit to speak the truth; so help, &c." After which one of the justices gave them the matter in charge, in this way: "This man, who is here present, charged with such a crime, comes and defends the death and every thing with which he is charged, and puts himself thereof upon your tongues, *de bono et malo*; and therefore we charge you, by the faith by which you are bound to God, and by the oath you have taken, that you make known to us the truth thereof; nor do you omit, through fear, love, or hatred, but that, having God before your eyes, you declare whether he is guilty of that with which he is charged, or not guilty; and do not bring any mischief on him, if he is innocent of the crime." According to the verdict given by the jurors, the party was either delivered or condemned.

The form in taking an inquest *per patriam* was to be observed by the justices in all cases, where a party, as in

(a) It seems from the manner in which Bracton expresses himself, as if, in cases of killing, the four townships which had appeared before the coroners were joined with the jurors of the *patria*, and must concur with them in their verdict. Bracton says, that any of the townships might be challenged, the same as the other jurors. Bract. 153, b. 154. a. Vid. ant. Vol. I, 193.

the above-mentioned instances, had put himself upon an inquest. Whenever the justices suspected the charge to be true, and that the jurors, through fear, or love, or malice, were inclined to conceal the truth, they might, if they pleased, separate them one from the other, and examine them apart, in order to sift out the real truth of the matter (a).

Here then do we see the office of the twelve jurors chosen out of each hundred at the eyre: they were to digest and mature the accusations of crimes founded upon report, and the notorious evidence of the fact; and then again, under the direction of the justices, they were to reconsider their verdict, and upon such review of the matter, they were to give their verdict finally. Again, wherever any circumstance rendered it unlawful or impossible that the duel should be waged in an appeal, the truth was enquired of by these jurors; and we may suppose, that in all other causes in the eyre, whether civil or criminal, where a matter arose that was to be tried by a jury, it was referred to one of these juries, who attended there on the business of the county. It may be collected from a single mention of purgation by Bracton, that a person charged *per patriam* might purge himself, as formerly (b), or put himself on the country, as before mentioned.

Now have we finished all that can be said concerning an appeal of death. There were Of other
appeals. several other cases of personal injury, where an appeal was the usual mode of prosecution. One of these was *de pace et plagis*, as they called it. The form of this appeal was, *A. appellat B. quòd* such a day, *sicut fuit in pace domini regis* in such a place, *venit idem B. cum vi sua, et contra pacem domini regis in feloniam, et assultu premeditato fecit ei insultum, et quandam plagam ei fecit* in such a part, with such a sort of arms; *et quòd hoc fecit nequiter, et in feloniam, offert probare versus eum*

(a) Bract. 143. b.

(b) Vid. ant. vol. I. 195.

per corpus suum, &c. as in the before-mentioned appeal. To this the appellee made his defence: *Et B. venit, et defendit pacem domini regis infractam, et feloniam, et plagam, et quicquid est contra pacem domini regis*, and so on, denying the whole appeal *per corpus suum secundum quod curia consideraverit*. In this there might be the same general exceptions made, as were stated in case of homicide; as, that suit was not made before the sheriff and coroners, and the like. The appellee might have his option, whether to defend himself *per corpus* or *per patriam*, except in some few cases, where the trial by duel was not allowed; as, if it was not a *plaga*, but only a bruise; and for that purpose the party was to be inspected and examined; for if it was not a *plaga*, it was only a trespass, and no felony (a). In like manner, if it was not laid *armis molutis*, but if it was done by a stone or stick, in this appeal, as well as in that of homicide, as we before observed, they could not decide it by duel; for these weapons, says Bracton, made only a bruise, and not a *plaga*, or wound (b).

Another appeal for a personal injury, more aggravated than the foregoing, was that *de plagis et mahemio*; which appeal was stated much in the words of the former: *A. appellat B. quòd cùm esset in pace domini regis* in such a place, &c. *venit idem B. cum vi sua, et in feloniam et assultu premeditato*, &c. as in the former, *et fecit ei quandam plagam in capite, ita quòd mahemiatus est; et quòd hoc fecit nequiter et in feloniam, offert probare versus eum, sicut homo mahemiatus, prout curia dom. regis consideraverit*: and the defence, *Et B. venit, et defendit*, &c. The first step to be taken was for the justices to inspect the wound, to see if it was a mayhem; and if it was, the appellee was constrained to defend himself by the country; for it would be a double injury to oblige the appellor to engage in the duel. A mayhem was defined to be, when a man was rendered,

(a) Bract. 144.

(b) Ibid. 144. b.

in any part of his body, unfit for fight; as if a bone was extracted from the head; if any bone whatsoever was broken; or the foot, hand, or finger, or joint of the foot or hand, or any other member was cut off; or if the sinews or any member were contracted, or the fingers crooked, by a wound; if an eye was beat out; in short, if any hurt was done to a man's body that rendered him less able to defend himself. Bracton thought, that breaking out the teeth was a mayhem, if they were the front teeth, because it disabled, in some measure, from fighting; but not so of the others. Castration was a mayhem, though an injury out of sight, and causing no outward disfiguring. There were some mayhems which were not a bar to the appellor engaging in the duel; as where an ear or a nose was cut off; this, though a disfiguring, not being such as would disable him from sustaining the duel. There lay in this appeal the same objections concerning the wounding and weapons, as in the former (a).

The next appeal, grounded upon a personal injury, is what they called *de pace et imprisonamento*; which was, where a free man was taken and imprisoned against the king's peace. The words of the appeal were, *A. appellat B. quòd sicut fuit in pace domini regis, &c. venit idem B. cum vi suâ contra pacem, &c. et duxit eum* to such a place, *&c. et in prisonâ ibi eum tenuit, &c. donec deliberatus fuit per ballivum domini regis; et quòd hoc fecit nequiter, et in feloniâ, offert, &c.* The defence was, *Et B. venit, et defendit vim, et injuriam, et pacem domini regis infractam, et captionem, et imprisonamentum, &c.* To this appeal might be taken the like exceptions as to the former. The appellee might justify taking him as his villain *nativus*, and might produce his relations to prove him such. The principal issue might be tried, as in the other appeals, *per corpus* or *per patriam*.

(a) Bract. 145.

In an appeal, says Bracton, *de pace et plagis*, and in this *de pace et imprisonamento*, they might proceed civilly, notwithstanding the fact was criminal, and make the complaint as for an injury, without charging it *feloniously*; *quòd B. imprisonavit A. contra pacem domini regis*: and so, if in the county, *contra pacem vicecomitis*; if in an inferior court, *contra pacem* of the lord. If it was laid as an injury in this manner, it would not be followed with any corporal pain, but only a pecuniary fine, by way of damages: but when it was prosecuted as a felony, these offences, as well as the others, produced a judgment of life and limb (a). It should seem, that an appeal, laid in this way, would become what we should now call an action of trespass.

Before we take leave of *imprisonment*, it may be proper to mention a more speedy redress, in cases of imprisonment, than an appeal. This might be resorted to, not only where a private person imprisoned or put restraint upon another, without any shew of authority, but also where officers of justice, under colour of process, caused persons to be put in confinement. It was from this latter case that the writ *de homine replegiando* took its name, and to this it was more peculiarly adapted; for, in the former instance, it was most probable a person would use that power, which the law allowed, of recovering his liberty by force, or whatever means fell in his way. The writ was directed to the sheriff, as follows: *Præcipimus tibi, quòd justè et sine dilatione replegiari facias A. quem B. cepit et captum detinet; nisi captus sit per speciale præceptum nostrum, vel capitalis justitiarii nostri, vel pro morte hominis, vel forestæ nostræ, vel pro aliquo alio recto, quare secundum legem Angliæ non sit replegiandus, ne amplius, &c. pro defectu justitiæ, &c. teste, &c.* (b). A man, therefore, who was taken and detained unlawfully, was to be discharged upon pledges being given, as in the case of goods taken for a distress.

(a) Bract. 145. b.

(b) Ibid. 154.

To these remedies by way of redress, or punishment when an injury had been done to a man's person, it may be added, that the law held out a protection, by way of security and prevention, to those who apprehended any danger of that sort. Thus a man might pray the king's peace in court against any particular person; and if such person should, after that, do any thing in breach of such peace, he incurred the penalty of the court's displeasure, and was accordingly in *misericordiâ* (a).

There now remain only four more appeals to be explained; that *de pace et roberiâ*; that *de combustione domorum*; that *de raptu virginum*; and lastly, that *de furto*.

The appeal of robbery was in this way: *A. appellat B. quòd sicut fuit in pace domini regis, &c. venit idem B. cum vi suâ, et nequiter et in feloniâ, et contra pacem domini regis, et in roberiâ abstulit ei, &c.* naming the thing taken, its quality, quantity, price, weight, number, colour, and the like. Sometimes there was contained in this appeal a charge of wounding, mayhem, or imprisonment. The conclusion was, as in the other appeals, *et quòd hoc fecit nequiter et in feloniâ, &c.* Then begun the defence, *Et B. venit, et defendit pacem et feloniam, &c.* A person might have this appeal for the goods of another which were then in his keeping, but he was to state such circumstance specially: *Abstulit ei decem aureos, de denariis domini sui, quos habuit in custodiâ suâ, et unde ipse intravit in solutionem erga dominum suum, &c.* The punishment of robbery depended upon the nature of the crime; it was sometimes punished with loss of life, and sometimes with loss of limb (b). The felonies of this time were punished variously, according to the circumstances of the case, by death or mutilation; and hence it was, that judgment of life and limb signified in after-times the same as judgment of felony.

(a) Bract. 142. b.

(b) Ibid. 146. a. b.

All burning of other persons houses, if done *nequiter et in feloniâ*, as on account of any malice, or animosity, or for sake of plunder, was punished capitally. The appeal was in these words: *A. appellat B. quòd cùm ipse esset in pace, &c. venit idem B. nequiter et in feloniâ, &c. ubi ipse A. interfuit et vidit, et ignem apposuit domibus suis, et eas combussit, et de catallis, &c. in roberiâ contra pacem, &c. asportavit, &c.* to which the appellee made his defence, and the proceeding was the same as in other appeals (a).

The appeal *de raptu virginum*, as it is called by Bracton, was not confined to those only who were literally such, but was a remedy in all cases where a woman had been *vi oppressa*. The punishment of this crime was *membrum pro membro*, according to Bracton; *corruptor puniatur in eo in quo deliquit; oculos igitur amittat, propter aspectum decoris, quo virginem concupivit; amittat et testiculos, qui calorem stupri induxerunt*. This was not always the punishment; but it was varied according to the character of the woman. It was sometimes greater, sometimes less; and depended on the woman being married, or a widow living in reputation, a nun, a matron, a lawful concubine, or one living in prostitution; for even these were under the protection of the king's peace. In former times, the corruptors of virgins used to be hanged; but the punishment was now reduced to the above pain, loss of limb, and other corporal punishments, and such offenders were never punished with death (b).

An appeal of rape was to be commenced and conducted like others. The words of appeal were these: *A. fœmina B. appellat C. quòd sicut esset in, &c. venit idem C. cum vi suâ, et nequiter et contra pacem domini regis concubuit cum eâ, et abstulit ei pucillagium suum, et eam detinuit secum per tot noctes*, setting forth the circumstances of the fact; and concluding, *quòd hoc, &c. offert probare, &c.*

(a) Bract. 146. b.

(b) Vid. ant. vol. I. 200.

as in other cases. Then followed the defence: *Et C. venit, et defendit feloniam, et pacem, et raptum, &c.* (a). It was an exception to this, as to other appeals, that there was not sufficient suit made; with others arising from the circumstances peculiar to this crime. The party might deny that she *amisit pucillagium*; which would be tried by inspection of four *legales fœminæ*. He might say, that she had before been his mistress; that it was with her consent; and he might put himself on the country to try it. He might except that there was no mention in the appeal *de pucillagio*.

As to the marriage of the parties after conviction, that was to be quite voluntary on the part of the woman, though it was a sort of necessity in the man, in order to save the pains of the law (b). An appeal against those guilty of force, in this crime, might be thus: *Quòd tenuit eam, dum idem B. abstulit ei pucillagium suum, or, fuit in consilio et auxilio* (c).

There were only two cases where a woman could bring an appeal: one was this, *de raptu*; the other was, *de morte viri sui inter brachia sua interfecti*. In the latter case, the appeal was always to charge the offence in that special way: *occidit ipsum B. virum suum inter brachia sua, &c.* (d).

In all the foregoing appeals it has been supposed, that the appellee was either in custody, or at least was forthcoming at the trial. When it was not so, there issued a writ of attachment. This, in case of homicide, was, *Si te fecerit, &c. tunc attachiari facias B. per corpus suum*: if in any other of the before-mentioned crimes, it was only, *Si te, &c. pone per vadium et salvos plegios*. Any of the before-mentioned appeals might be removed from before the justices itinerant (to whom it was the course for the parties to have a day given by the county) into the court *coram nobis, vel justitiariis nostris apud Westmonaste-*

(a) Bract. 147. b.

(b) Ibid. 148.

(c) Ibid. 148. b.

(d) Ibid. Vid. ant. vol. I. 251.

rium; for which purpose, a writ of *venire facias appellum* would issue, containing in it likewise a *pone per vadium et salvos plegios* against the appellee. If he did not appear upon any of these attachments, another writ issued, *quod facias interrogari de comitatu in comitatum*, till he was outlawed, at the king's suit (a). The above process of attachment was likewise the course if the appeal had been begun in the first instance, as it might have been, *coram ipso rege, vel justitiariis suis de banco*. Did any contest arise about the agreement between the appeal made in the county and that in the superior court, there issued a *recordari facias* to the county, to enable the justices to compare them (b).

Among other offences we must not omit *theft*, which, since the time of Glanville (c), had become one of the pleas of the crown. There lay an appeal of this offence not only in the king's great court, but also in the county court, court baron, and others. As this seems to be in violation of the prohibition of *Magna Charta*, it must be considered what sorts of theft were held to be out of the meaning of that act. Theft was either *manifest* or *not manifest*. The latter was, when a person was suspected of theft *per famam patriæ*, and where there were strong presumptions appearing against him: of this kind of theft, none could hold plea but only the king in his own courts. But of *manifest* theft, which was when the offender was taken with the thing upon him, and was called *handhabende* and *bacberende*; of this several inferior courts might hold plea (d).

The jurisdiction and judicature of these inferior courts was termed by some very barbarous names. Lords of franchises had cognizance of crimes under the titles of *Sok et Sak, Tol et Team, Infangethef et Utfangethef*. *Infangethef* was, when a thief was taken with the thing stolen upon him (*with the manour*, as it has since been termed)

(a) Bract. 149. (b) Ibid. 149. b. (c) Vid. ant. vol. I. 250. (d) Bract. 150. b.

within the lord's land, being himself one of the lord's tenants. *Utsangethef* was, when a stranger was so taken. Thus, these authorities to judge of theft were entirely local; the lord having no power to pursue his own tenants out of his jurisdiction, but yet enjoying a right to question strangers, when they accidentally came within it, under particular circumstances of guilt. Where the thief was not taken *with the manour*, then it belonged only to the king's court to enquire thereof (a).

Theft is defined by Bracton to be, *con-*
tractatio rei alienæ fraudulenta, cum animo Of theft.
furandi, invito illo domino, cujus res illa fuerit. The words of appeal were, *Quod in feloniam, et furtivè, et in latrocinio, et contra pacem domini regis cepit rem illam, et furtivè abduxit eam; et quòd hoc fecit furtivè, et in feloniam, offert, &c.* To this the appellee answered, and defended the felony and larceny, either *per corpus* or *per patriam*. If he chose the former, they proceeded as in other cases: if the latter, he might state many things in his defence (b). He might say, the thing supposed to be stolen was his own, and shew the reason thereof; as if it was a horse, he might say it was foaled by one of his mares, and that he bred it; and if this was testified by the country, he was set at liberty, unless the appellor could shew by the country and the vicinage, and by some other certain proofs, that it was his foal, and he bred it up: and when a *secta* was thus produced on both sides, that was preferred which was the greater and more deserving of credit. But if both sides were upon an equality as to their *secta* and testimony, then other credible persons were to be called out of the neighbourhood, who were not connected with either of the parties; and for whomsoever they agreed, he was adjudged to be in the right, and so the matter was decided. If the defendant said he bought

(a) Bract. 154. b.

(b) Ibid. 150. b.

it, or that it was given him, then he was to call the seller or giver *to warrant* it. They then proceeded as in cases of vouching to warranty in civil suits. The warrantor, if he appeared, either entered into the warranty, or denied his being bound to warrant; and in that case, the appellee was to prove it against him *per corpus*, and so it was decided by duel. If the warrantor entered into the warranty, then the appeal went on between the appellor and him, and the appellee was discharged. The warrantor might vouch over, and so on. If the warrantor did not appear, there issued not a summons, but a *venire facias*.

If the thing stolen was bought, and the buyer had no warrantor to vouch, there was a distinction between buying privately, and publicly in a fair or market, in the presence of the officers of the market, where a toll was paid; for, in such case, the appellee, upon restoring the thing without receiving back the price, would be discharged from the appeal (a). It sometimes happened that sturdy fellows, who were best suited to this kind of decision, were hired to warrant: if this appeared to the justices, they might direct it to be enquired of *per patriam*, and such champion was to have his foot and fist cut off. The punishment of theft depended on the value of the thing taken. No christian man (says Bracton) is to lose his life for a small theft. However, he does not specify the degree of value which made the distinction, as now, between grand and petty larceny: he only says, that a thief convict was, according to the value of the thing, either to die, or to abjure the realm, or country, or county, city, borough, or vill; or he was to be *fustigatus*, and then discharged.

It was generally held, that a wife should not be charged *ex facto viri*, because, being supposed to be under his power and controul, the law, in tenderness, would not

(a) Bract. 151.

make her answerable for a participation *primâ facie* in the fact with her husband. Yet if she evidently appeared to make herself an assistant in the felony, as if the thing was found in her own separate custody, she would be considered as a party to the theft. On the other hand, the circumstance of property found in possession of the wife, did not conclude the husband so as to make him a party. Indeed it seemed to depend upon nice circumstances, whether a wife committing felony together with her husband, should be considered as participating in the offence; and whatever privileges were allowed the wife, no concubine, nor any of the family, could claim them^(a). A woman convict, if pregnant, was not to be executed till she was delivered^(b).

Persons convicted of a felony could not bring an appeal against any one. The law ^{Of provors.} pronounced of them *frangitur eorum baculus*; meaning, that they were disabled from deraigning the duel in proof of their charge. But it was not so of a *probator* or *provor*, as he was called; for he, though he confessed his crime, was not regularly convicted thereof; and the king would grant such a person his life, upon condition that he would contribute to free the country from felons, either *per corpus*, *per patriam*, or *per fugam*, by causing them to fly. A man who had thus confessed his crime, was to appeal others as accomplices therein. This sort of accusation was kept under some check; for if the person appealed by him was a liege man to some one, and in frankpledge, and had some lord who would vouch for him, and he himself was willing to put himself upon the country; if he was delivered and acquitted by that country, the provor was to be condemned as a liar and convict felon. But if the person appealed was in no decenna, nor had any lord to own him, and had refused to put himself upon the country, as he appeared on the same sus-

(a) Bract. 151. b.

(b) Ibid.

picious footing with the provor, they then were permitted to wage the duel. So, again, if he had consented to put himself upon the country, and the country had declared him a suspicious person, then, likewise, the duel was to be resorted to.

If a felon confessed his offence before the sheriff and coroners, and became a provor, and still continued, when before the justices, to accuse others, he was to bind himself to convict such a number as he named; and upon those terms his life was granted him. None could admit a man to become a provor but the king, as none but he alone could pardon the pain of death. The judge might do this, as the king's representative in judicature, either by his own authority, or under the direction of a special writ commanding him so to do (a): in either case, there issued process of attachment against the parties appealed, and so on to outlawry, if necessary.

The words of appeal were: *A. de N. COGNOSCENS se esse latronem, appellat B. de societate, et latrocinio; quod ipsi simul furati fuerunt, &c* (b). to which the appellee answered, *Et B. venit, et defendit societatem, et latrocinium, &c*. The duel was waged, and the oath taken in the same manner, *mutatis mutandis*, as in other cases. If the provor vanquished one, he was to go on with the others. Should the appellee be successful, he was not to be wholly discharged, but, on account of the suspicions arising from the charge, he was to be let out on pledges, unless the justices saw any particular reason for committing him to gaol; as if he was indicted by the knights, or other credible persons. In the former case, if he could not find pledges, he was to abjure the realm, or to remain in gaol for ever (c); as should the other appealed persons, if the provor died before the duel. The provor, if victorious, was to have his life according to the terms on which it was promised; but was to be sent out of the

(a) Bract. 152.

(b) Ibid. 152. b.

(c) Ibid. 153.

realm, even though he offered pledges to answer for him(a). Thus stood the law concerning provors; an expedient in the prosecution of criminals, founded upon the loose state of the police, when malefactors were suffered to associate in great parties, and could not be easily discovered but by setting them one against the other.

We have hitherto considered only the higher order of crimes, which were prosecuted criminally, and produced either capital punishment, loss of limb, or banishment, perpetual or temporary. It follows, that some notice should be taken of the lesser order of crimes, which were prosecuted civilly. Actions founded upon injuries, as they are called by Bracton (by which are meant actions of trespass), belonged, as well as the former, *ad coronam regis*, inasmuch as they were(b) *contra pacem domini regis*. *Injuria* is defined by Bracton to signify any thing *quod non jure fit*. Those injuries of which we are now going to speak, were followed by a pecuniary penalty, to which, according to the nature of the case, was sometimes added imprisonment. An injury was not only when a person was wounded, beat, or struck; but also when any slander was spoken of him, or a *famosum carmen* was made on him. Again, a man might sustain an injury not only in his own person, but in the persons of others who were under his authority, as in those of a wife or children. But though a man might have an action for an injury to his wife, she could not have one for an injury done to him; for though the wife was to be defended by the husband, he was not to be protected by her. A man also might suffer an injury when any was done to his servant, or villain; as if they were any way beaten(c), and his honour was thereby hurt, or any interruption occasioned to his affairs; for

(a) Bract. 153. b.

(b) *Aliquando*, says Bracton; they sometimes did, and sometimes did not belong *ad coronam regis*.

(c) Bract. 155.

otherwise an action for beating belonged to the servant, and not to the master. An action for an injury, or, as it may be more properly called, an action of trespass, lay not only against the person actually striking, but against all procurers and contrivers thereof. This action should be brought immediately; for if the injury was dissembled for any time, such delay would bar the party of his action (a).

Of *vetitum namium*. *Vetitum namium*, or the detention of a *namium* (now called a distress), was a subject belonging to the jurisdiction of the king's crown; and cognizance thereof was rarely allowed to any except the king or his justices. But because questions of distress required dispatch, on account of the nature of the subject taken, which was sometimes living animals, a special jurisdiction used to be given to the sheriff, who, in this instance, did not act in his office as sheriff, but as *justitiarius regis*. If any one claimed a franchise to hold plea *de vetito namio*, it was *ut justitiarius regis*, by special grant (b). The title of distress is passed over by Glanville, with a bare mention of the writs directed to the sheriff commanding him to make deliverance (c). The learning upon this subject had, since his time, been wrought up into some size and system; a sketch of which, as it now stood, it may be very proper to give.

The questions arising in this plea related either to the *caption* or *detention against gage and pledge*. The caption might be just or unjust. It was just, when taken for a service detained by a person who acknowledged it to be due; and in that case the taker might avow the taking: but if the things justly so taken, were detained against gage and pledge, after security was offered for payment of the service, and all arrears, (or whatever the cause might be, as damage done, some trespass, debt, or the like)

(a) Bract. 155. b.

(b) Ibid. 155. b.

(c) Vid. ant. vol. I. 175.

then, though the caption might be just, the detention was unjust. If the lord defended the unjust detention, and the plaintiff had at hand his *secta*, who all agreed in testifying in support of the fact, then was the defendant to wage his law *duodecimâ manu*; and if he failed in so doing, he was *in misericordiâ* to the sheriff (for we are now speaking of this proceeding when in the county), and was to restore to the plaintiff the damage he sustained by the detention. Had he succeeded in making his law, he would have gone quit; the cattle would be returned to the lord; the plaintiff would be *in misericordiâ* (but without paying damages); and must satisfy the lord for the service due.

Had the question been upon the unjust caption; as for a service which the plaintiff disclaimed, and did not acknowledge to be due, and of which therefore no plea could be held without the king's writ; if the plaintiff shewed by a sufficient *secta*, that the taking was for a service which he disclaimed; then, as this was a point upon *the right*, which in a proper proceeding by the king's writ might come to be decided by the duel, or the great assise, there was an end of the suit in the inferior court, and resort must have been made to the writ of right (a), which was the writ that was afterwards called a writ of right *sur disclaimer* (b). If the lord had seisin *per manum tenentis* of the service for which the distress was taken, and upon the plaintiff's denying it, this was verified *per patriam*; the plaintiff was *in misericordiâ*, and he was to return the cattle to the lord; for in this case, as there was a recent seisin, they could not possibly come to the duel, or the great assise. But should the inquest find that the lord had not seisin *per manum tenentis*, then *he* was to be *in misericordiâ*; the plaintiff was to recover his damages; the cattle delivered were to

(a) Bract. 156.

(b) O. N. B. 167.

remain in his hands; and the lord had no redress but some writ in which he might try the right by the duel, or the great assise. In like manner, should the tenant die, and the heir deny the service, the lord might alledge against him a recent seisin thereof *quasi per manum tenentis*, if he had seisin thereof a year and day before the tenant's death.

Complaint might be made both of the unjust caption and detention; and when the complaint was of this sort, and the defendant denied both, if one was found for the plaintiff and one for the defendant, one party was to be *in misericordiâ*, as to one, and the other *in misericordiâ pro falso clamore*, as to the other. If the lord made default after he had waged his law, or had failed in his endeavour to make it, the cattle were to be delivered to the plaintiff, whatever might be the event of the suit.

The subject of replevin and distress will be understood better, if we trace it from its commencement through all its stages. When any one had a complaint that his cattle were taken, or detained against gage and pledge, he either applied for a writ commanding the sheriff *quod replegiari facias*, as we saw in Glanville's time (a); or made a verbal complaint to the sheriff, who, upon having security *de prosequendo* properly given, would, without a writ, proceed to make replevin. The manner of replevying was this: The sheriff went in person, or sent one of his officers, to the place where the cattle were detained, and demanded a sight of them. If this was denied him, or any violence was done to prevent it, he might immediately raise a hue and cry, and apprehend the offenders, as persons who acted in manifest violation of the king's peace, and put them in prison. If he could not find the cattle to make deliverance of them, and it appeared that they were driven away; then, if the taker had any land and chattels in

(a) Vid. ant. vol. I. 175.

the county, the sheriff's officer was to take some of his cattle to double the value, and detain them till the distress was brought back, which, in after-times, was termed *a taking in withernam*. If the taker had no land or chattels within the county, as the sheriff's power could reach no further, recourse must be had to a writ of attachment, as follows: *Si A. fecerit, &c. pone per vadium et salvos plegios B. quòd sit coram justitiariis nostris apud Westmonasterium, &c. ostensurus quare cepit averia ipsius in comitatu, &c. ubi idem B. non habet terras nec tenementa, et ipsa fugavit à prædicto comitatu, &c. usque ad comitatum tuum in fraudem, extra potestatem vicecomitis, &c. et ibidem ea detinet, contra pacem nostram, ut dicit, &c. (a).*

If no opposition was made to the sheriff, or his officer, but he was suffered to have a sight of the cattle, he was immediately to cause them to be delivered to the complainant; and then he gave a day to both parties, to appear at the next county, that the taker (who could not deny the taking against the sheriff's testimony, he, in this case, having the authority of a record) might shew his taking to be just; and the complainant, that it was unjust. At the day appointed in the county, the taker could have no essoin, as an unjust taking and detention against gage and pledge was considered in the unfavourable light of a robbery, and was held to be against the peace, even more than a disseisin was. At the day, the taker was to state his reasons for the caption.

The grounds upon which a justification for taking cattle might be rested, were many. It was very common, in these times, to justify under the judgment of the lord's court, where it often happened there had been some compulsory proceeding to recover the duty in question. Thus the taker might say, that *justè cepit*, and *per considerationem curiæ suæ, pro servitio quod idem quærens, et tenens suis ei*

(a) Bract. 157.

debut, et ei injustè detinuit; for which he might vouch his court to warranty, if he pleased, and deny that he detained it against gage and pledge. To this the plaintiff might reply, *quòd ille injustè cepit, et detinuit*; "because, being
"summoned to appear in the defendant's court to answer
"for certain services and customs demanded of him, he
"there said he owed him no services, and demanded
"judgment, if he was to be put to answer without the
"king's writ, in a matter that touched his freehold; and
"yet, nevertheless, the defendant took his cattle, and di-
"strained them for a service which he did not admit to
"be due, and when he demanded his cattle, he refused to
"deliver them;" *et de hoc producit sectam*, which was to consist of credible persons, who were present in court. If they agreed in maintaining what he had said, then the court was summoned; and if that agreed with the *secta*, then there remained nothing but to enquire whether the distress was made by judgment of the court, or by the lord's own voluntary act. If the former, then the court was *in misericordiâ*, for its false judgment; if the latter, then the lord was *in misericordiâ*; and in both cases the cattle remained with the person to whom they had been delivered. If there had been no proceeding in the lord's court, and he justified for service due, then they proceeded as before-mentioned, observing the above distinction, where the service demanded was a question of *right*, and where of *recent seisin* (a).

The defendant might avow the taking to be just, because he had a freehold in which neither the plaintiff nor any one else had a right of common, or other easement, and yet the plaintiff had put his cattle there without any right, and therefore he took them; though he was ready to restore them, if the plaintiff would abstain from the like trespasses, which he refused to do. To this the plain-

(a) Bract. 157. b.

tiff might reply, that the taking was unjust, because he had a right to common there, which he was ready to shew as the court should direct ; and therefore it was, that he would not find pledges to obtain a release of his cattle. When the suit was brought to this issue, the county court could proceed no further in it, and the cattle were to remain with the person to whom they had been delivered. If the plaintiff still persisted in exercising the right, the defendant, could he not otherwise defend himself, might have an assise of freehold, or the plaintiff an assise of common.

The defendant might say, that the taking was just, because he found them *damage feasant*, or doing damage in his land, and therefore he impounded them, as by the law and custom of the realm he might do, till satisfaction was made him ; that the plaintiff would not make satisfaction, nor give security for it ; nor did he demand them upon gage and pledge ; or, if he did, they were tendered to him : and of all this the defendant was to produce his *secta*. If the plaintiff meant to deny the whole, he was to *defend* it (for so Bracton expresses himself, as if he considered the plaintiff, in this situation, in the light of a defendant) *per legem*. If he meant to reply to any particular parts of the defendant's answer ; as, that though they were taken lawfully by the defendant, yet they were detained unjustly against gage and pledge, for he came with other credible persons to the defendant, and offered to make amends, which he refused, and still detained the cattle ; then, in either of these cases, he was to produce a sufficient *secta* : and if the defendant meant to deny the whole of the reply, he was to wage his law ; so that then law would be waged on both sides. If the plaintiff denied that any damage was done, or that any was shewn to him when he tendered amends, then the defendant was to produce a *secta*, to prove that he took them *damage feasant* (a). Where a defendant justified for

(a) Bract, 158.

service due, if the plaintiff said there was nothing in arrear, and produced a sufficient *secta* to prove it, the taking being thus proved unjust, the defendant could not defend himself *per legem* (a).

If a servant had taken cattle in the absence of his lord, and, when they were afterwards demanded of the lord, he refused to deliver them upon gage and pledge, then they were both liable, the one for the caption, the other for the detention; and if he avowed the caption, this did not free the servant, but both of them became answerable for the servant's act (b). When the cattle had been once delivered by the judgment of the county court, they were not to be taken for the same cause, till the suit was determined; and if any should presume to take them again, it was considered as a breach of the peace, and there issued a writ, stating specially what had been done therein, and commanding the sheriff, *quòd habeas coram justitiariis ad primam assisam, &c. corpus ipsius B. ad respond. de secundâ captione, &c.* or the party might be heavily amerced in the sheriff's court, *coram te, et coram custodibus placitorum coronæ nostræ, ut castigatio illa in casu consimili aliis timorem tribuat delinquendi*, as one of the forms of this writ expresses it. This second caption, or, as it was afterwards called, *recaption* (c), as well as the first, was to be proved by examining the *secta* produced on both sides (d).

Sometimes chattels were demanded, under the name of *averia*; as where any one had begun to hedge, or raise a fence upon another's soil, and had brought a cart, horses, and tools there; if these were detained against gage and pledge, the question might be brought into the county court, in the above way. But here, if the plaintiff said the *locus* was his freehold, the jurisdiction of the county

(a) Bract. 158. b.

(b) Ibid.

(c) This writ of Recaption is said by the O. N. B. to be by the Stat. Marl. c. 3. but we see it was at the common law.

(d) Bract. 159.

failed, and recourse must be had to an assise of novel disseisin; and in the mean time the things were to be returned (a).

Thus have we travelled through the learning and practice of the reign of Henry III. It is with regret that we must here take leave of an author who has been our constant and faithful guide through the intricate paths of this long pursuit. From the time we are deserted by Bracton, we are left to make the remainder of our inquiry with such information as can be collected from many different sources. Instead of having the whole of the law of any particular period laid open to our view in a systematical manner, we must be content, except in a very few instances, to pick out the following part of our narrative from statutes and records, year-books and other compilations.

It appears from the investigation which we have just been making, that, notwithstanding the civil commotions of this reign might perhaps, in some particular cases, interrupt or suspend the full execution of the law, the learning of it was advanced to a very high degree. The great pains bestowed by Henry II. on establishing our law and improving the administration of justice, enabled it to take deep root, and support itself through the reigns of Richard and John, though not assisted by any particular regard from those monarchs. In this reign it had acquired a stability, which withstood every discouragement and check from the turbulence of the times.

The study of the civil and canon law had contributed to further this improvement, and to furnish considerable accessions both of strength and ornament. Those two laws, besides exciting an emulation in the professors of the common law to cultivate their own municipal customs, afforded from their treasures ample means of doing it. Much was borrowed from thence, and ingrafted on the original stock of the common law. But the manner in which this was

(a) Bract. 159.

done is very remarkable. Though our writs and records are in the language in which the Roman and pontifical jurisprudence were written and taught, there is not in either the least mark of imitation; the stile of them is peculiarly their own. The use made of the civil and canon law was much nobler than that of borrowing their language. To enlarge the plan and scope of our municipal customs; to settle them upon principle; to improve the course of our proceeding; to give consistency, uniformity, and elegance to the whole; these were the objects the lawyers of those days had in view: and to further them, they scrupled not to make a free use of those more refined systems. Many of the maxims of the civil law were transplanted into ours; its rules were referred to as parts of our own customs; and arguments grounded upon the principles of that jurisprudence were attended to as a sort of authority. This was more particularly so in what related to personal property; while the law of descent, the inquiry *per famam*, purgation, wager of law, and other parts of our judicial proceedings, seem borrowed from the canonical jurisprudence.

A considerable accession had been made to the original canon law contained in the *Decretum of Gratian* by the publication of the *decretals* of Gregory the Ninth, which happened during this reign. This must have given new vogue and reputation to canonical studies; and, no doubt, encouraged the common-lawyers of this age to pursue their enquiries, in that way, with more freedom. The application they made, whether of the canon or civil law, in treating subjects of discussion in the law of England, is visible from the account just given from Bracton. To consider particularly, how much of the latter is indebted to those two systems, either for its origin or improvement, would lead us into a larger field than our present design could allow. It seems to be an object of a separate consideration; and might, perhaps, make a proper appendage to a History of the English Law.

The Book of Feuds was published during this king's reign, about the year 1152; and the particular customs of Lombardy, as to feuds, began to be the standard and authority to other nations, on account of the greater refinement with which that kind of learning had been there cultivated. It is probable, that compilation was known here; but it does not appear, that it had any other effect than influencing our lawyers to study their own tenures with more diligence, and work up the learning of real property with much curious matter of a similar kind. Thus tenures in England continued a peculiar species of feuds, partaking of certain original qualities in common with others, but, when once established here, growing up with a strength and figure intirely their own. While most of the nations in Europe referred to the Book of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in our law-books any allusion that intimates the existence of such a body of constitutions. To trace out the affinity between the Law of Feuds which prevailed with us, and that which governed in Lombardy, and other parts of the continent inhabited, and settled by the German invaders, would be a subject of very curious enquiry; but this likewise, for the reasons before given, must be passed over in silence.

As study was encouraged, and the learning of the law advanced, a curious anxiety to improve, imperceptibly led to refinement. The scholastic logic of the times was affected by all persons who wished to have the appearance of learning. The law, a disputatious science, naturally adopted the prevailing fashion; and our courts, like our universities, were filled with subtlety of argument, and captiousness of exception. In the reign of Henry III. this rage of minute refinement had infected all branches of the law; and made almost every part of our jurisprudence in the highest degree artificial and complex.

Having taken a view of the law, as it stood in the 50th year of this reign; it follows now, that we should mention

the statutes made subsequent to that period. The first of these is the *assisa panis et cervisiæ*, made in 51 Hen. III. stat. 1. containing many provisions on the subject from which it is intitled. To this statute another of the same year, intitled *judicium pillorie*, may be considered as supplemental. In the same year follow two statutes relating to the days of appearance in court, which deserve more particular notice. The first is intitled, *Dies communes in banco*, generally in all real actions; the other is intitled, *Dies communes in banco in placito dotis*. These two acts afford us the first opportunity of speaking particularly concerning the days for return of writs, and continuance of proceedings, in term.

We have already seen that writs were returnable at certain stated days in different seasons of the year (a). These returns, or *termini ad quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *terminus*, or *term*; during which the returns were seldom more than seven or eight days distant from each other. It has not yet appeared that any precise rule was settled, by which a writ was required to be returnable at any one of these stated days in preference to another. Indeed, in the early times of our law, there does seem to have been some difference between the length of time allowed to persons summoned. In a law of one of our Saxon kings, it is directed, that if the party dwelt one county off, he should have one week; if two counties, two weeks; and so, for every county a week (b). The same is laid down by a law of Henry I. with a restriction not to go beyond the fourth week, *ubicunq; fuerit in Angliâ*; but if the party was beyond sea, he might have six weeks (c).

There is no intimation, either in Glanville or Bracton, of any such rule prevailing in their times. It is not how-

(a) Vid. ant. vol. I. 191.

(b) Leges Etheld. c. 93.

(c) Leg. Hen. prim. c. 141. Vid. Spelma. on Terms, sect. 5. ch. 6.

ever unlikely, that the returns, in the time of the latter, might nearly correspond with the scheme laid down by the statute of *dies communes in banco*. But this act does not give us intire satisfaction on that head; for, being only a direction to the justices *in banco*, how to fix the returns of process which they issued in consequence of the return of some other writ, we are still uninformed as to the rule that governed in the return that was to be affixed to original writs. These we know might be obtained in the office of the chancery, any day in the year. Whether they were made returnable at the pleasure of the clerks who penned them, or at the option of the purchaser, as is more probable; or whether a certain rule subsisted in the chancery-office on this head, we are not able to collect. When the original was once returned *in banco*, the rule for making the return of process upon it, and process upon that process, was as follows.

The statute of *communes dies in banco* directs, that if a writ came (according to the language of those times, or, as we should say now, was returned) *in octabis* of St. Michael, a day should be given (that is, the writ which issued upon it should be returnable, and there should be a *dies datus partibus*) *in octabis* of St. Hilary; if *in quindenâ* of St. Michael, day should be given *in quindenâ* of St. Hilary. If a writ came in three weeks of St. Michael, day was to be given *in crastino Purificationis*; if in a month of St. Michael, *in octabis Purificationis*; if on the morrow of All Souls, *in quindenâ* of Easter; if on the morrow of St. Martin, in three weeks of Easter; if *in octabis* of St. Martin, in a month of Easter; if *in quindenâ* of St. Martin, in five weeks of Easter. There was a special day given *in crastino Ascensionis*, which countervails (says the act) the same as in five weeks of Easter. If a writ came *in octabis* of St. Hilary, day was to be given *in octabis* of the Holy Trinity; if *in quindenâ* of St. Hilary, *in quindenâ* of the Holy Trinity, and sometimes *in crastino* of St. John the Baptist; if on the morrow of the Purifica-

tion, *in crastino*, or *in octabis* of St. John the Baptist; if *in octabis* of the Purification, *in quindenā* of St. John the Baptist; if *in quindenā* of Easter, *in octabis* of St. Michael; if in three weeks of Easter, *in quindenā* of St. Michael; if in a month of Easter, in three weeks of St. Michael; if in five weeks of Easter, or on the morrow of the Ascension, in a month of St. Michael; if *in octabis* of the Holy Trinity, on the morrow of All Souls; if *in quindenā* of the Holy Trinity, or on the morrow of St. John the Baptist, on the morrow of St. Martin; if *in octabis* of St. John the Baptist, *in octabis* of St. Martin; if *in quindenā* of St. John the Baptist, *in quindenā* of St. Martin. Such is the manner in which these continuances connected one term with another. The returns that intervened between the issue and return of a writ were generally eight or nine, and the space of time about five or six months. But this will be better discerned by the annexed diagram (a).

If the process in any of the many actions which we have considered in the course of this reign, was compared with this scheme of continuances, we should then see what a length of time must often be consumed, before a party could be brought into court. We shall content ourselves with one example; namely, the process in a personal action, as given by Bracton (b). Suppose a summons in a personal action was returnable *in octabis Michaelis*, the 6th of October; the process of attachment issued upon that, would be returnable *in octabis Hilarii*, the 20th of January. If the party did not appear, there issued a second attachment *per meliores plegios* returnable *in octabis Trinitatis*, the 19th of June. If he did not then appear, there issued a writ of *habeas corpus* to take the body, returnable *in crastino Animarum*, the 3d of November. Thus ended the

(a) How these differ from the terms in former times, vid. ant. vol. I. 192. It appears, that in the time of Glanville there were the three following returns in Easter Term, viz. *In crastino post octabas clausi Paschæ*—*a crastino octabis clausi Paschæ in quindecim dies*—*a clauso Paschæ in quindecim dies*. Glanv. lib. 1. c. 6. 13. 15. Vid. also Spelm. on Terms.

(b) Vid. ant. vol. I. 480, &c.

solennitas attachiamentorum; and so passed away a full year, and almost one month.

If the sheriff returned upon this last writ, as it was probable he would, *non est inventus*, they then resorted to the process of distress; and a *distringas per terras et catalla* would issue, returnable *in tres septimanas Paschæ*, the 8th of May. If he did not appear to this, there issued another *distringas*, returnable *in quindenâ Michaelis*, the 13th of October. If he did not appear, another *distringas* issued, *ne quis manum apponat*, returnable *in quindenâ Hilarii*, the 27th of January. If he still did not appear, another writ issued for a caption into the king's hands, returnable *in quindenâ Trinitatis*, the 26th of June, or *in crastino Sti. Johannis Baptistæ*, which happen sometimes on the same day. And here ended the distress *per terras et catalla*; and the space of one year and more than seven months; so that the whole of this process from the return of the summons to the return of the last *distringas*, would continue two years and more than eight months.

This is the utmost length to which the above process might be extended, if no essoin was cast; but if any essoins intervened, and they were managed with dexterity, particularly if the parties could essoin *simul et vicissim*, the appearance in court might be still further protracted. Delays were not at an end, even after appearance. In real actions, we have seen how frequent occasion there was for summons and resummons; upon all which essoins might be cast. In all actions, whether real or personal, there were writs of *venire*, and other judicial process, together with *dies dati partibus*. The delay that might be procured by all these must have placed the issue, judgment, and execution, at a great, uncertain, and almost unlimited distance.

Judicial process, like a *venire*, which issued merely out of the record, might not, perhaps, be considered as strictly within the statute; which, in the terms of it, is literally

confined to the issue of a writ, upon the return of a former. It is, therefore, not improbable that, in such cases, the justices exercised a discretion to shorten the intervals of the continuances, in the same manner as we know they had, very freely, in lessening the number of them (a). At any rate, the return of a *venire facias* for summoning jurors must have been accommodated to the seasons within which such trials could be had. The *dies datus*, we know, was left not only to the discretion of the court, but to the election of the parties; hence, *dies amoris*, and *dies datus consensu partium*.

In general, however, the justices were tied up to the times prescribed by this statute. This produced great inconvenience; to remove which the legislature interposed both in this and the following reign.

In the very same year an act was passed, by which the writ of dower was made an exception to the above scheme of continuances; for, in that, days were to be given at much shorter intervals, in order that widows might not be delayed in recovering the maintenance which the law had provided for them. If a writ of dower came *in octabis* of St. Michael, day was to be given only to the morrow of All Souls; if *in quindenâ* of St. Michael, to the morrow of St. Martin; if in three weeks of St. Michael, *in octabis* of St. Martin; if in a month of St. Michael, *in quindenâ* of St. Martin; if on the morrow of All Souls, *in octabis* of St. Hilary; if on the morrow of St. Martin, *in quindenâ* of St. Hilary; if *in octabis* of St. Martin, on the morrow of the Purification; if *in quindenâ* of St. Martin, *in octabis* of the Purification; if *in octabis* of St. Hilary, *in quindenâ* of Easter; if *in quindenâ* of St. Hilary, in three weeks of Easter; if on the morrow of the Purification, in a month of Easter; if *in octabis* of the

(a) Vid. ant. vol. I. 355, 356.

Purification, on the morrow of the Ascension ; if *in quindenâ* of Easter, *in octabis* of the Holy Trinity ; if in three weeks of Easter, *in quindenâ* of the Holy Trinity ; if in a month of Easter, on the morrow of St. John the Baptist ; if in five weeks of Easter, *in octabis* of St. John the Baptist ; if on the morrow of the Ascension, *in quindenâ* of St. John the Baptist ; if *in octabis* of the Holy Trinity, *in octabis* of St. Michael ; if *in quindenâ* of the Holy Trinity, *in quindenâ* of St. Michael ; if on the morrow of St. John the Baptist, in three weeks of St. Michael ; if *in octabis* of St. John the Baptist, in a month of St. Michael ; if *in quindenâ* of St. John the Baptist, then on the morrow of All Souls. These intervals, as may easily be seen, were much shorter than those appointed by the former statute to be observed in all other actions ; we shall find, that many other exceptions were made thereto in succeeding parliaments.

These are followed by two statutes concerning the exchequer, both passed in the same year : the first is entitled, *De Distractione Scaccarii* ; the other, *Statutum de Scaccario*. The former speaks of the damages sustained by the commonalty of the realm, through the wrongful distresses which had been taken by sheriffs, and other bailiffs of the king, for the king's debts, and for other causes. To remedy such evils, the statute ordains generally, that when a sheriff, or any other man, took the beast of another, the owner of the beasts might give them their feed without disturbance, so long as they were impounded, and should pay nothing for their keep ; nor was the distress to be given or sold within fifteen days after the taking. It further ordains, that no one shall be distrained by the beasts that plough his land, nor by his sheep, so long as other distress or chattels can be found sufficient whereof to levy the demand ; which provision, as well as the former, has been construed to extend to the distresses of private persons, as well as to those of the king. But this exception of beasts

of the plough and of sheep, seems not to relate to cattle *damage feasant*, which were still to be taken according to the old custom of the realm. It was moreover required, that all distresses should be reasonable, and according to the value of the demand. The remainder of this statute, and the whole of the other, is confined to the collection of the king's debts, and the accounting for them in the exchequer. After these statutes, in the same year, follows the *Dictum de Kenelworth*, and then the statute of Marlbridge or Marlborough, 52 Henry III. containing some provisions of a miscellaneous kind, which deserve more particular observation.

Statute of
Marlbridge. This statute was made after the long contest between the king and his barons had subsided, and the nation began to breathe from the disorders of civil war. During this period, many abuses had prevailed, some of which it was intended to remedy by this statute.

Of all the oppressions that were felt from the doctrine of tenures, none bore so hard upon landholders, as the claim of wardship. Many devices had been practised to defraud lords of this valuable casualty. One of them was this: A tenant would, in his life-time, infeoff his eldest son and heir, being within age; in consequence of which, as there was no descent of the land, there could be no ward of the infant, in case the father should die. It was declared by this act, that no lord should lose his ward by reason of such feoffment. Another way was, to make a feoffment in fee, reserving no rent, but supposing the feoffor to be satisfied for a certain term, which upon calculation would end when the heir came to full age; and then it was conditioned that the feoffee should pay a certain sum, being much more than the land was worth: as none would give so high a price, the heir used to enter by virtue of the original condition: but it was now declared, that no lord should lose his ward by reason of any such feigned feoffments. Yet lords were not to be empowered to disseise

persons infeoffed in that way ; but they were to proceed by a writ to recover the custody. The trial, whether such feoffments were made *bonâ fide*, or in fraud of the lord, was to be by the witnesses contained in the deed of feoffment, and other free and lawful men of the country. Should the lord have judgment to recover his ward, the feoffees were still to have their action to recover the term, or fee, which they had therein, when the heir came of age. On the other hand, it was provided, that should any lord implead feoffees, who were *bonâ fide* such, under pretence of the above-mentioned collusion, they should have their damages and costs, and the plaintiff should be amerced (a).

A provision in protection of heirs against the intrusion of their guardians, was partly a new regulation, and partly a declaration and confirmation of the common law. First, it was enacted, if a lord having wardship of an infant's lands would not restore them when he came of age, the heir might have an assise of mortaucestor, and recover the damage he had sustained by the withholding of the land since his coming of age (b). It was moreover declared and enacted, that where the heir was of full age at the death of the ancestor, the lord should not put him out, nor remove any thing, but only take simple seisin thereof (for so *relief* was sometimes called) in acknowledgment of his seignory ; and if such an heir was put out, and had recourse to a writ of mortaucestor, he should be intitled to his damages, as in an assise of novel disseisin. It was declared, that the king was to have the *prima seisin*, or *primer seisin* (which corresponded with *relief*) of his tenants *in capite*, as was used in times passed ; nor was the heir to have it till he had first sued livery of the land out of the king's hands, as his ancestors had before done. This was to be understood of lands and fees which used to be in the king's hands by reason of knight's service, ser-

(a) Ch. 6.

(b) No damages were recoverable in an assise of mortaucestor at common law. Vid. ant. vol. I. 366.

jeanty, or *juris patronatús*, that is, of the foundation of bishoprics, monasteries, and the like (*a*). So great havock had been made in the rights of persons, and of things, during the late disorders, that a parliamentary sanction was necessary to confirm some of the plainest propositions in the common law.

The law underwent some alteration in favour of a particular description of wards. It was enacted, that when land holden in soccage was in the custody of the heir's relations during his minority, the guardian should make no waste, sale, or destruction of the inheritance, but safely keep it for the use of the heir; and, when he came of age, should answer to him for the issues, by a lawful accompt, with an allowance to the guardian of his reasonable costs. Such guardians were not to sell the marriage of the heir, except for the emolument of the heir himself (*b*); so that the privilege of guardians in soccage, which heretofore had been the same as that of guardians in chivalry (*c*), ceased to be a source of emolument. But the great lords, who composed the legislature, had no inclination to make the same provision in case of ward and marriage in military tenure.

Some provision was made for the better ordering of services. As to suit of court, owing to great lords and others, it was ordained, that no person infeoffed by charter need do more than the charter bound him to; excepting such suit as any one or his ancestors had been accustomed to perform before the king's first voyage into Brittany, which was thirty-nine years and a half before the statute of Marlbridge (*d*). As to those who were infeoffed without charter, from the time of the Conquest, or some other ancient feoffment, they were not to be distrained to do such

(*a*) Ch. 16.

(*b*) Ch. 17.

(*c*) Vid. ant. vol. I. 288.

(*d*) In the 14th year of the king, before the disorders of his reign had given opportunity for the invasion of every species of property. We have before seen, that this period had been fixed for the limitation in a writ of nuisance, and also in an assise of novel disseisin; though, in the latter instance at least, in direct violation of the Stat. Mert. Vid. ant. vol. I. 344. 325. 264.

suits, unless they or their ancestors had performed them before the above period of limitation. Further, persons infeoffed by charter to do a certain service, as to pay so many shillings in the year to be acquitted of all services, were not to be bound to any other suits or service *contra formam feoffamenti*, contrary to the terms of their feoffment. It enacts (as had before been directed where such cases happened in Ireland) (*a*), that where an inheritance descended to parceners, the eldest should do the service, and the others be contributory to her according to their portions. Where there were several feoffees of land for which only one suit was due, the lord was not to exact more than that one suit; and if the feoffees had no warrantor or mesne to acquit them, then every one of them, according to his portion, was to be contributory towards doing the service.

Thus far did this act make order for apportioning suits and services: it goes on to furnish a course of redress for those who were injured contrary thereto. It ordains (*b*), that should lords distrain their tenants for such suits contrary to this act, then, at the complaint of their tenants, they were to be attached to appear in the king's court, at a short day, to make answer thereto. Upon this clause a writ was afterwards framed, called, from the design of it, *contra formam feoffamenti*. This writ, as it is not mentioned by Bracton, who is very particular on the subject of services, probably did not exist at common law, notwithstanding a supposed case in Fitzherbert (*c*); besides, the writ bears an internal mark of its origin, by always reciting this statute. The remedy in such cases before was of a less concise nature than what was now proposed; for now, besides the process of attachment, the lord was to have but one essoin, if he was within the realm; and the beasts taken on the occasion were to be immediately

(*a*) Vid. ant. vol. I, 259.

(*b*) Ch. 9.

(*c*) Avow. 243. 16 Hen. III.

delivered to the complainant, and so remain till the question between them was determined. If the lord did not appear upon the attachment, nor keep the day given by the essoin, another writ went; and if that was not obeyed, then he was to be distrained by every thing he had within the county, and the sheriff was to answer to the king for the issues thereof(*a*); he was also to have his body at a certain day. If the lord came not at that day, the complainant was to go *sine die*, and the beasts and other distresses taken were to remain with him, until the lord recovered the services by judgment of the king's court: in the mean time, all further distresses for the same services were to cease; though the lord was yet to be at liberty to sue for them, in form of law. If the lord came in, and upon answer was convicted, the complainant was to recover the damages he had sustained by the distress.

Distresses.

While this redress was provided for the tenant, the following was contrived for the lord. If tenants withdrew from their lords such suits as they had continued to perform before the above period of limitation, then the lord of the court to which suit was owing, was to recover it with damages, by the same speedy justice as to the limiting of days, and the awarding of distresses, as was above provided for tenants. It was enacted also, that lords should not recover seisin of such suits against their tenants by default, as was the old course at common law(*b*).

Many provisions had been made in the former part of this statute concerning distresses. It complains, that, during the late troubles, great men and others refusing to abide the order of the king's courts, and the due course of the law, took upon them to be their own judges in their own causes, and revenged themselves of their neighbours

(*a*) That is, the process was to be an attachment, and then another attachment *per meliores plegios*, and then the last distress. Vid. ant. 58, 59. and vol. I. 480.

(*b*) Ch. 6.

by taking distresses, till they had fines and ransoms paid at their pleasure: others, again, would not be justified, that is, submit to the king's officers, nor suffer them to make delivery of such distresses as they had taken of their own authority, though without any pretence of right to justify them. To remedy these disorders, it was now enacted and enjoined, that they should not be any longer endured; and further, that any person taking revenge, without a judgment of the king's court, should be punished by a fine according to the offence (*a*): in the same manner of a distress made without authority: besides such fine, amends were to be made to them who had sustained any damage by the distress (*b*). Moreover it was declared, that none should distrain any person to come to his court, who was not within his fee, or within his hundred or bailiwick; nor was any to take distresses out of his fee or place where he had a bailiwick or jurisdiction: all which, like the provisions of the former act, were nothing more than declarations of the law as it stood before; only in this, as in the former case, it was ordained, that persons offending against this act should be punished in damages and fine, as above mentioned, according to the nature of the fact (*c*). Again, if any would not permit such distresses as he had taken to be delivered by the king's officers, according to the law and custom of the realm, or would not suffer process of summons, attachment, or execution of judgments of the king's courts to be done according to law, he was to be punished in the above-mentioned way, as one who would not be justified by the law of the land.

(*a*) Lord Kaimes is certainly mistaken, when he relies upon this provision of the Stat. Marl. to shew that it was a practice warranted by our old law to force payment of a debt by taking, at short hand, a pledge from the debtor.—The distresses here meant are mentioned by the act as *breaches* of the law, and do not correspond with *poinding* in the *Scotch Law*. Kaimes Law Tracts, 158. Ersk. b. 3. tit. 6. sect. 12.

(*b*) Ch. 1.

(*c*) Ch. 2.

The former chapters of this statute inflicted punishment where the distress was unlawful, or the person distraining had no seignory, or jurisdiction at all, or distrained out of his fee or jurisdiction. The following provision was made respecting distresses that were lawful. It directs, that where a lord distrained his tenants for services and customs due to him, or for any thing which gave the lord of the fee a right to distrain, and it was afterwards found that the services were not in arrear, the lord should not be punished by fine, as in the above cases, if he suffered the distress to be immediately delivered according to the course of law; but should be amerced only in such manner as had hitherto been used, and the tenant should recover his damages against him^(a). The general construction of this chapter has been, that an action of trespass was hereby taken away in such cases^(b); though, from the bare words of the act, there seems to have been no such design in the legislature, but merely to exempt distresses of this kind from any conclusion which might possibly be drawn from the former provisions respecting distresses that were wholly unlawful.

It was declared and enacted, that no one should drive a distress out of the county where it was taken; and if one neighbour did so to another, of his own will, and without any lawful right, he was to be punished by fine, as for an offence *contra pacem*. Nevertheless, if a lord did so towards his tenant, he was to be proceeded against in another way, and only amerced heavily. It was declared, that distresses should be reasonable; and that those who took unreasonable and improper distresses, should be heavily amerced for the excessiveness thereof^(c).

As the king had, by his prerogative, a right to distrain for rent in any of his tenant's lands, though they were out of his fee and seignory, several lords had taken upon themselves to do the like; but it was now enacted, that no man

(a) Ch. 3.

(b) 2 Inst. 106.

(c) Ch. 4.

should, for any cause whatsoever, take a distress out of his fee, or in the king's highway, or in the common street, except only the king, or his officers having a special authority for so doing (*a*).

The only remedy in case of distress was a writ of replevin, the manner of proceeding in which is still fresh in the reader's memory (*b*). Some time was required before a replevin could bring relief to the owner of the goods or beasts; and this delay was greatly increased when the distress was impounded within a liberty that had return of writs; for the sheriff could not, in general, act within such franchise in person, but was to make a warrant to the bailiff thereof, ordering him to make deliverance (*c*). To remedy such inconveniencies as might arise from these exclusive jurisdictions, it was provided by another chapter of this statute, that where the beasts of any man were taken, and wrongfully withheld, the sheriff, upon complaint made to him, might deliver them without any impediment or contradiction of the taker, if they were taken *out* of a liberty; and if taken *within* one, and the bailiff thereof refused to deliver them, then the sheriff, upon their default, might himself make a deliverance of them (*d*). Thus was the sheriff confirmed in his (*e*) power to make replevin without a writ; and, either by parole or by precept, either in or out of the county court, he might now command his bailiff to deliver the distress: a very great improvement in the proceeding by replevin.

Another abuse of the summary process by distress, was endeavoured to be removed by chap. 22. of this statute (*f*), which ordains, that none should distrain his freeholders to answer for their freeholds, nor for any thing touching their freeholds, without the king's writ; nor should any cause his freeholders to swear against their wills; because, says

(*a*) Ch. 15.

(*b*) Vid. ant. 46.

(*c*) Vid. ant. 48. in what manner Bracton states the authority of the sheriff in this particular.

(*d*) Ch. 21.

(*e*) Vid. ant. 43.

(*f*) Ch. 22.

the act, no man has any authority to do that, but by the king's command. It should seem, that, before this, lords would by distress compel their tenants to discover their title-deeds, and shew by what services they held, and so lay them open to litigations and contest: a proceeding more harsh and unpopular than even that by *quo warranto* or *quo jure*, which was calculated to attain the same object, and was, unfortunately, justified by law (a). The swearing here is supposed to mean the discharge of their duty in the court baron and hundred court, where the freeholders were *sectatores* and judges, and were sometimes forced, by oppressive distresses, to give their verdict *on oath* between party and party, according to the pleasure of the lord (b).

The remaining part of this statute relates to the general administration of justice, either civil or criminal. We shall first consider what concerns the former. Of this, the first is the chapter upon *beaupleader*. It seems, that bailiffs and judges of inferior courts had followed the example, set by kings of England, of selling justice, and used to take fines of suitors for a fair or perhaps favourable hearing of their cause; which fair hearing was called *pulchrè placitare*, or *beaupleader*. It was ordained, that neither in the itinera of the justices, nor in the counties, hundreds, nor courts baron, should any fines be taken *pro pulchrè placitando, nec per sic quòd non occasionentur* (c). That this is the meaning of *beaupleader*, and not that it was a fine for amending a wrong plea (d), seems probable from a passage in the *statutum Walliæ*, and from the manner in which the author of *Fleta* speaks of this fine: *Nititur, says he, dominus vel ejus senescallus ipsos OCCASIONARE, arguendo, et redarguendo, donec finem fecerint pro pulchrè placitando* (e). The statute says, *Vicecomes verò, in veredictis, et recognitionibus admittendis, non quærat OCCASIONES versus præsentantes, nec capiat ab eis fines per sic quòd non*

(a) Vid. ant. vol. I. 426.

(b) 2 Inst. 142. (c) Ch. 11.

(d) 2 Inst. 122, 123.

(e) Flet. 147.

OCCASIONENTUR (a); which, at least, has no reference to pleading. Upon this statute a writ was framed to relieve those who were distrained for any fines of this kind (b).

In furtherance of proceedings in court, it was provided, that charters of exemption and liberties, granting that certain persons should not be impannelled in assises, juries, or recognitions, should not operate as an impediment to justice; but that, where right could not be done without them, as in the great assise, in perambulations, and in charters and deeds of covenant where they were witnesses, and in the like cases, they should submit to be sworn; saving, however, their franchise in all other cases (c).

When a court baron had given a false judgment, it seems, the regular order of appeal was to the court baron of the lord next above, and so upwards to the chief lords; but if the next immediate mesne lord had no court, the judgment could not be redressed in the court of the next superior, for want of privity, and recourse was to be had to the bench, or the justices in eyre (d). This series of appeal occasioned great delay and expence: to prevent which it was provided, that none, except the king only, should hold plea of false judgment given in the court of his tenants; for such pleas, says the statute, *specialiter spectant ad coronam et dignitatem domini regis* (e). False judgments were thenceforward to be heard in the common-pleas and the eyre. A great inducement to the king for depriving inferior courts of this subject of jurisdiction, and bringing it immediately into his own court, was, that the fines to be imposed for false judgments were thereby brought under the immediate cognisance and direction of the king's justices.

The power of amercing for defaults was exercised by all persons authorized to make judicial enquiry; and this power was exercised in a manner not wholly satisfactory.

(a) Stat. Wall. 12. Ed. I.

(b) Flet. 147.

(c) Ch. 14.

(d) 2 Inst. 138.

(e) Ch. 20.

An act, to the following effect, was therefore made to redress this: It was ordained, that no escheator, or enquirer (which is said to signify sheriffs, coroners *super visum corporis*, and all those who received power to enquire in special cases) (a), or justice assigned specially to take certain assises, or to hear and determine certain complaints, should any longer have authority to amerce for default on the common summons; and, in short, none but the *capitales justitarii in itineribus suis* (b).

Writ of entry in the *post*. Among the alterations made for the improvement of judicial proceedings, that which concerned the writ of entry was of great importance. We have seen, that this new remedy was confined to certain degrees, which gave a denomination to the different writs, some of which were thence said to be in the *per*, and others in the *per* and *cui* (c). This was a check upon the application of the writ of entry, which, in other respects, was of a general import, and capable of being further extended. With a view to this, it was ordained, that if those alienations upon which a writ of entry used to be had, were so many degrees removed, as not to be properly within it, the complainant should have a writ to recover his seisin, without mention of the degrees, into whatsoever hands the land should have come by such alienation: and this, says the statute, shall be *per brevia originalia per concilium domini regis providenda* (d). In pursuance of this permission, a new writ was formed, called a *writ of entry in the post*, because, instead of specifying the particular steps by which the alienation had happened, it said generally, that *post* such alienation, &c. This new writ, from its indefinite nature, was applicable to almost every possible case of ouster of freehold, and tended to make the writ of entry a still more general remedy.

(a) 2 Inst. 136.

(b) Ch. 18.

(c) Vid. ant. vol. I. 121. 393.

(d) Ch. 29.

There were two defects in the law, as some thought, respecting the property of abbots, priors, and other religious persons and societies, which it was now endeavoured to remove: first, if the goods of a monastery were taken away in the time of a predecessor, it was an opinion, that, after his death, the successor had no remedy for the trespass: the other defect was, that, if in the time of a vacancy, when there was no abbot or prior, (or whoever might be the head) any intrusion were made, the successor had no remedy to recover the land with damages, though the predecessor died seised thereof: both these were now remedied (a).

Several provisions were made for improving the process of law. By one act it was provided, that if bailiffs, who ought to account with their lords, withdrew themselves, and had no lands or tenements by which they might be distrained, they should be attached by their bodies, so as the sheriff might cause them to come to render an account (b). Thus was a process against the person framed upon this statute, beginning with *Monstravit nobis A. quòd cum B. ballivus suus, &c.* (c) of which, and the action of account, more will be said in the next reign. While this care was taken for securing the regular accounting of bailiffs, the interest of the lord was again consulted by another provision, that restrained farmers from making waste. It is the opinion of some (d), though not, as it should seem, well founded (e), that there was no remedy at common law for waste, except against a tenant by courtesy, in dower, and a guardian. These being, say they, estates created by operation of law, the law likewise provided that they should not be abused; but such interests as were conferred by agreement between man and man, were left wholly to the terms of such agreements; and if there was no provision made therein by the

(a) Ch. 28. 2 Inst. 151.

(d) 2 Inst. 299.

(b) Ch. 23.

(e) Vid. ant. vol. I. 386.

(c) Fleta.

parties themselves, the law would make none for them. But the common law was otherwise; and it was now enacted, in confirmation thereof, that farmers (which signified as well those for life as for years), during their terms, should not make waste, or exile of woods, houses, or men, nor of any thing belonging to their farm, unless they had a special licence or covenant for so doing; and if they did, and were convicted thereof, they should refund full damages, and be heavily punished by amercement (*a*).

The other parliamentary regulations about process were as follow: Chap. 7. speaks of *the common writ de custodia*; of which there appears no mention in Glanville nor Bracton. It should seem, however, that this meant *the writ of right of ward*. The process in this, as in most other personal actions, was summons, attachment, and distress. This was thought not sufficiently compulsory, where the possession of the ward was, probably, of more value than all the lands and goods which were taken by the distress. A new course was therefore devised; and it was enacted, that if the deforceors came not at the (*b*) great distress, then the same process should be repeated twice or thrice, within the next six months, and be read openly in the county court: and that proclamation should be made for him to appear at a day limited; and if he came not at the end of half a year, according to the proclamation, he was to lose the seisin of the ward, as a rebel, and one who would not abide the judgment of the law. If a custody was demanded against one who held it by reason of ward, the process ordained by this statute was not to lie; but that proceeding was left to the course of the common law (*c*).

(*a*) Ch. 23. This latter clause, about waste, is made a separate chapter in 2 Inst. and is numbered as the twenty-fourth chapter; which makes this statute contain thirty chapters in that author, though in the common editions it has only twenty-nine.

(*b*) By the great distress is meant the last and most compulsory of the four processes of *distringas*.

(*c*) Ch. 7.

The process in several actions was altered in the following way: Not satisfied with the special exception already made from the *dies communes*, in favour of process in dower *unde nihil* (a), the parliament now declared in a general way, that *dentur quatuor dies per annum ad minus*, and more if conveniently could be, so that they should have five or six in the year at least (b). In assises *ultimæ præsentationis*, and suits of *quare impedit*, of churches vacant, days were to be given from fifteen to fifteen days, or from three weeks to three weeks, as the place happened to be near or remote; and in a *quare impedit*, if the disturber appeared not at the first day of summons, nor cast an essoin, he was to be attached; and if he did not appear to that, he was to be distrained by the great distress. If he still made default, a writ was to go to the bishop of the place to prevent the lapse. This shortening of the process in *quare impedit*, was only confirming a practice (c) established (though as Bracton says without sanction of the law) by the courts upon their own authority. It was further enacted, in all cases of attachment, that the second attachment should be *per meliores plegios*, and then should follow immediately the last distress (d): a regulation which put the first check upon the *solennitas attachiamentorum* (e) and the four processes of *distringas*.

In order to save some of the grievous delay occasioned by essoins, it was enacted, that after any one had put himself upon an inquest, no party should have more than one essoin, and one default (f). As no inquest could be taken by default in a real action, this provision has been held to relate to personal actions only (g). Again, no one was to be obliged to swear, as had been the practice, to warrant the truth of an essoin (h): though the statute speaks ge-

(a) Vid. ant. 60.

(b) Under the former statute the returns were about five in a year. The common returns in the statute of *dies communes* are not more than two in a year.

(c) Vid. ant. vol. I. 355, 356.

(d) Ch. 12.

(e) Vid. ant. vol. I.

482, 483.

(f) Ch. 13.

(g) 2 Inst. 126.

(h) Ch. 19.

nerally of essoins, this provision has been held to apply only to the common essoin *de malo veniendi*, so that the practice of swearing the warrant of other essoins still continued (*a*). Warrantors in pleas of land were exempted from a fine for non-appearance at the summons of justices in eyre, but were to be further warned to appear (*b*).

The last provision on the subject of process was to give effect to a regulation made by the statute of Merton about re-disseisins. It had been directed by that act (*c*), that a person guilty of re-disseisin should be committed to prison, till he was delivered by the king, *vel aliquo alio modo*. Under these last words, such persons used to be delivered by the common writ *de homine replegiando* (*d*). To prevent this in future, it was now ordained, that they should not be delivered *sine speciali præcepto domini regis*, and that they should also make fine with the king for the trespass. If the sheriff delivered them any otherwise, he was to be grievously amerced; and the person so delivered was to make fine for the trespass (*e*). Thus far of the provisions of this statute relating to civil matters.

Some few alterations were made in our criminal law by this statute. The splendid appearance of the sheriff's tourn was wholly diminished by a law, which ordained that archbishops, bishops, abbots, priors, earls, barons, or any religious man or woman, should not be obliged to attend there, unless they had some special business; but the tourn in other respects was to be held as formerly, in the time of *Magna Charta*, and of the reigns of king Richard and king John. Those who had tenements in different hundreds were not to be obliged to attend the tourn, except only in the district where they were most conversant (*f*). The attendance before the sheriffs and coroners was virtually dispensed with in another instance. It was declared,

(*a*) 2 Inst. 127. (*b*) Ch. 26. (*c*) Namely, c. 3. Vid. ant. vol. I. 264. (*d*) 2 Inst. 115. (*e*) Ch. 8. (*f*) Ch. 10.

that the justices in eyre, in their circuits, should not, in future, amerce townships, because all such as were twelve years of age came not before the sheriffs and coroners to make inquiry of robberies, burnings, and other things appertaining to the king's crown, provided there were sufficient others of the townships to make inquisition. However, it was still required, that in inquisitions for the death of a man, all persons twelve years old should appear, unless they had a reasonable excuse for their absence (a).

A provision was made on the subject of *murder*, which has created some difficulty among modern lawyers. *Murdrum*, says the statute, *de cætero non adjudicetur coram justitiariis, ubi infortunium tantummodo adjudicatum est; sed locum habeat murdrum in intersectis per feloniam, et non aliter* (b). The fine called *murder*, which has been so often mentioned, though by the general law only due upon a secret felonious killing, yet, as appears from Bracton (c), was by the particular custom of some places exacted in other cases of homicide, and even in such as were not felonious. The object of this statute, therefore, was to abrogate such customs, and reduce the whole law of the realm to an uniformity. This is very different from the opinion of those who imagined the *murder* here spoken of to signify the fact of killing; and that the statute ordained, that killing *per infortunium* should not be deemed felonious, or murder.

The other regulation concerning matters of crime was this: that where a clerk was arrested for an offence, and was afterwards by the king's command let to bail, or replevied, with a condition, that they to whom he was let to bail, should have him before the justices; such sureties and such bail, if they had his body before the justices, were not to be amerced, though he refused to answer, and claimed his privilege of clergy (d): a provision which seems dictated by

(a) Ch. 24. Vid. ant. vol. I. 263. (b) Ch. 25. (c) Vid. ant. 22.

(d) Ch. 27.

such plain and obvious justice, that one may wonder how it ever should be thought necessary to be secured by statute.

These were the alterations and confirmations of the common law made by the statute of Marlbridge, 52 Hen. III. to which may be added a chapter, whose substance was frequently repeated in the following reigns. This required, that *Magna Charta* should be observed in all its articles, as well those relating to the king, as to others; and it was directed, that this should be enquired of before the justices in eyre in their circuits, and before sheriffs in their counties. Writs were to be granted *gratis* against such as offended therein, returnable *coram rege, coram justitiariis in banco*, and before the justices itinerant; the like of the Charter of the Forest: all offenders of this kind were to be grievously punished (*a*).

In the mean time the legislature of the national clergy were employed in framing regulations, that were considered as binding to a certain degree, like those of the parliament. Several synods were holden during this reign; some by archbishops, and some by the pope's legates. The former were *provincial*, the latter *national* councils; the *constitutions* made in the former are accordingly called *provincial*; but those in the latter, *legatine*. Of the canons and constitutions made in these assemblies, many have come down to our times. These form a kind of national canon law; and as such, were better received than the pontifical law, which had been introduced into the kingdom in the reigns of Henry II. and John. From the parliamentary appearance of those assemblies, their laws carried in them some similitude to acts made by the legislature of the kingdom. The subjecting the church and clergy to such an authority seemed reasonable, consistent, and safe. Among

(*a*) Ch. 5.

the legatine constitutions of this reign, the most distinguished are those of Cardinal *Otto*, made in a council held in 1220; and those of Cardinal *Ottoboni*, in one held in 1268.

These constitutions, whether provincial or legatine, are principally taken up in such matters as peculiarly belonged to the consideration of a national assembly of the clergy. The life and conversation of churchmen; the due administration of spiritual things; whatever related to religion or to manners; such are the objects upon which these clerical ordinances are mostly employed. But among these godly and sober regulations, there are certain constitutions of a famous prelate that breathe nothing but the spirit of clerical ambition. These are the constitutions of Boniface archbishop of Canterbury. This determined successor of Becket had set on foot all the claims so steadily urged by that famous martyr in the cause of the church; and resolved, by a legislative act of the convocation, at once to establish them for law, at least as far as they could be established by the sanction of an ecclesiastical synod.

By the authority of a convocation held A. D. 1261, he ordained, that if any archbishop, bishop, or other inferior prelate, should be called by the king's letters before a secular judicature, to answer respecting matters that were known to concern merely their office and court ecclesiastical; as, whether they had admitted, or not admitted clerks to vacant churches; whether they instituted, or did not institute rectors; whether they had passed excommunication or interdiction; whether they had consecrated churches, celebrated orders, taken cognisance of causes purely spiritual, as tythes, oblations, bounds of parishes, and the like (which, says the constitution, cannot concern the secular court); whether they had taken cognisance of sins, or excesses, as perjury, *fidei læsio*, or breach of faith, sacrilege, violation or perturbation of ecclesiastical liberty, (particu-

larly as such violators and perturbators were subjected to excommunication by the confirmation solemnly passed of *Magna Charta*) (a); or whether they took cognisance of actions personal concerning contracts, or *quasi-contracts*, trespasses, or *quasi-trespasses*, either between clerks, or between clerks complainants, and laymen defendants; if any archbishop, bishop, or other prelate were called upon by the king's letters to answer before a secular judicature upon any of the before-mentioned points, it was ordained by the authority of this clerical council, that they should not appear: for these were all pronounced by the same authority to be spiritual matters; and further, that no power was given to laymen to judge God's anointed; (as laymen, instead of an authority to command, were under a necessity to obey the church, and churchmen) (b); and they were directed, either to go, or to write to the king, to inform him that they could not, but at the hazard of their order, obey such mandate.

He further ordained, that if the king's prohibition or summons should speak, not of tythes, but of right of advowson; not of breach of faith, or perjury, but of chattels; not of sacrilege or disturbance of ecclesiastical liberties, but of trespass of some of his subjects; then the prelates were to make answer, that they neither had, nor pretended to have cognisance of rights of advowson; nor of chattels, nor of things that belonged to the king's courts; but only of tythes, and other things merely spiritual, appertaining to their office and jurisdiction, and to the safety of souls; and they were to pray him, that he would not prohibit

(a) A. D. 1253. When Boniface and the other bishops, solemnly in Westminster-hall pronounced excommunication against the infringers of that statute. Vid. ant. vol. I. 258.

(b) This is the language of the canon law: *Laicis super ecclesiis et ecclesiasticis personis nulla sit attributa facultas, quos obsequendi manet necessitas, non imperandi autoritas.* Decret. lib. 1. tit. 10.

their proceedings in such cases. To this extent did they state their claim of jurisdiction.

The manner in which the council directs the bishops to act in support of this jurisdiction, is very worthy of notice. It directs that the bishop who was immediately affected by the king's interposition, should admonish him to desist. If he did not desist upon this representation, then the archbishop was to wait on the king, or, in his absence, the bishop of London, as dean of the bishops, taking with him two or three more bishops; and if, after this, the mandate was enforced, the sheriffs and officers who made the attachment or distress were to be excommunicated, and their lands laid under an interdict: if clerks and beneficed, they were to be suspended and deprived; if not beneficed, they were not to be admitted to any benefice for five years. Canonical punishments were also inflicted on those who advised, dictated, or penned the writs. If the king did not, upon this, revoke such process, the bishop immediately affected was to put under an interdict all the vills and castles of the king within his diocese; if he still persisted, the other bishops, as in a common cause, were to do the same. If the process was not revoked within twenty days, then the archbishop and bishops were to put their whole dioceses under an interdict.

Such was the process devised by this council of churchmen against the king, if he presumed to encroach on their clerical privileges by the forms of law (*a*): but the pope, who saw reasons for changing his policy with respect to the church and churchmen in this country, and began to entertain some jealousy of their independence, readily consented, on the application of the king (*b*), to annul the whole of these provincial constitutions.

These canons, however, made a variance between the

(*a*) Vid. Lyndw. Provinc. ad finem. Johnson's Canons. Spelm. Conc.

(*b*) Hum. vol. II. 192.

temporal and ecclesiastical power. In the year 1267, which was the 51st of this king, the archbishop Boniface and the rest of the clergy made a formal complaint to parliament, and exhibited many articles as grievances, called *articuli cleri*. What the contents of these articles were we are ignorant, except so far as can be collected from the mutilated remains of some of the answers given by the parliament. From these, and from the tenor of the before-mentioned canons, it may be conjectured what was their principal aim (a).

Such was the state of the law, whether common or ecclesiastical, at the close of this reign.

The king and government.

There was not in this king, nor in his ministers, any remarkable attention to the cultivation of our laws. They were all too much employed in concerting schemes of defence against the rebellion and intrigues of the potent barons. However, notwithstanding this neglect, and the convulsions attendant on civil broils, the events of this reign had a very great effect in promoting the improvement of our laws.

Hitherto our kings had been kept under no rules of government, but had exercised a prerogative above law, except such as the necessity of the time, and their own discretion, prescribed them. The establishment of the Great Charter, as it defined certain points of supreme authority, and ascertained some valuable privileges of the subject, so far put a restraint upon the royal power. The king had now certain bounds limited to him, which he could not transgress without the invasion being perceived, and the nation taking immediate alarm.

Nor was the disposition which Henry so frequently shewed to break through this new restraint without some good effect. It occasioned resistance in the barons, which ended in repeated and more solemn confirmations of this

(a) 2 Inst. 599.

great declaration of the subjects rights. In the mean time, the jealousies of the people, long engaged on this one object, wrought wonderfully on their minds: the violence with which the observance of this law was demanded, might inspire an habitual regard for laws in general.

The king felt very uneasy under the restrictions imposed by *Magna Charta*; and, not forgetting the arbitrary manner in which his predecessors had ordained, suspended, or qualified laws, he used frequent pretences to avoid a compliance with it. In the writs, at one time, directed to the sheriffs to enjoin an universal observance of the Charter, he caused a remarkable clause to be inserted; namely, that those who did not pay the fifteenth granted at the time of the late confirmation, should not, for the future, be entitled to the benefit of the liberties thereby confirmed.

He carried his power of dispensing much farther: he is said to be the first of our kings who employed the clause of *non obstante* in his patents and grants. Henry, when remonstrated with upon this innovation, alleged the example of the pope, and claimed an equal right. Thus were the usurpations of the pontiff, against which our kings had heretofore made the most determined stand, become precedents for their own invasions of the national laws.

There are some few instances in which Henry took a personal part, in enforcing the execution of the laws. When a jury in Hampshire had acquitted some felons, contrary to plain evidence; and it was afterwards known that they themselves had been in the confederacy with the offenders; he, in a rage, committed them all to prison, and ordered another jury to be impannelled (a). Henry stood forth himself in parliament as the prosecutor of *Henry de Bath*, chief justice of England, when some charges of mal-practice were exhibited against him (b).

The administration of justice was sometimes interrupted by the violence of the times. It is related, that in 1224,

(a) M. Paris, 509. Hume, vol. II. 228.

(b) Parl. Hist. vol. I. 51.

Fowkes de Breauté, when thirty-five verdicts of disseisin had passed against him, came into court with an armed force, seized the judge, and imprisoned him in Bedford castle. This offender was afterwards banished (a); but, though *his* life was spared, his brothers and other noblemen, to the number of twenty-four, who assisted in this outrage, and stood a siege of the castle against the king's forces, were all hanged.

Statutes. The sources of information begin at this period to be more authentic. We have, in this reign, some statutes enacted by the legislature, besides the Charter of Liberties and the Charter of the Forest. These statutes are either to be found on the rolls in the Tower, or in some memorials, which have delivered them down to us as acts of parliament, and therefore we are not at liberty to dispute the genuineness of them. Many parliaments were holden in this long reign, and it is thence inferred, that many acts must of course have passed, which have not reached our times; though it is remarkable, that Bracton, except in four or five instances (b), quotes no statutes but those which are now extant. So destructive has the hand of Time been, that only two of those few we have are to be found upon record.

The only statutes of this reign to be found on the statute-roll, are *Magna Charta* and *Charta de Foresta*. The rest are not on record, but only preserved in books and memorials. Such are the statutes of *Merton* and *Marlbridge*. This destruction of ancient documents has given occasion to the following position, that notwithstanding the record itself be not extant, yet general statutes made within time of memory, that is, since the first of Richard I. do not lose the force of *statutes*, if any authentic memorials of their being such are to be found in books, seconded with a general received tradition attesting and approving the same (c). In conformity, perhaps, with this fa-

(a) M. Paris, 221. 224. Wilk. Sax. Leg. 382. (b) Vid. ant. vol. I. 440.

(c) Hale's Hist. 16. Vid. ant. vol. I. 215.

vourable presumption, it has become a rule, that courts are to take notice of general acts of parliament, without pleading them; for such statutes are never to be put on the issue of *nil tiel record*, but are to be tried by the court; and, if there be any difficulty or uncertainty, the judges are to make use of ancient copies, transcripts, books, pleadings, or any other memorials to inform themselves.

The statutes of this reign which are now in being, are to be found in the common editions of the statutes. The statutes from *Magna Charta* down to the end of Edward II. including also some, which, because their period is not ascertained, are termed *incerti temporis*, are sometimes called the *vetera statuta*; those from the beginning of the reign of Edward III. being contradistinguished by the appellation of the *nova statuta*.

Among the remains of legislation during this reign, are to be reckoned the *legatine* and *provincial constitutions*, which contributed to lay a foundation for a national canon law. It is to the collections of antiquaries and canonists, and not to any authentic depository, that we must resort for a sight of these productions of our clerical legislature. They are to be found in Spelman's Councils, and at the end of Lyndwode's *Provinciale*; not to mention that they are likewise arranged and commented amongst others in that very work (a).

There are also some records of pleadings and proceedings during this reign. Besides these, there are some very few notes of adjudged cases to be found in Fitzherbert's Abridgment. These are mentioned not so much for their importance, as on account of their great antiquity; being the first of that kind of memorials, which, in after-times, became so numerous, and furnished the best materials for explaining the grounds, reason, and progress of our laws.

Bracton. The great ornament of this reign is the treatise of Henry Bracton *De Legibus et Consuetudinibus Angliæ*, which has been so often quoted. Brac-

(a) See also Johnson's Canons.

ton's book, compared with that of Glanville, is a voluminous work. The latter is little more than a sketch, as far as the plan of it goes, and that is confined to proceedings in the king's court; but the former is a finished and systematic performance, giving a complete view of the law, in all its titles, as it stood at the time it was written. It is divided into five books; and these into tracts and chapters (a).

(a) Because the form, in which this work is printed, does not much contribute towards exhibiting to a cursory inspector the plan and design of the whole, it may be convenient to give a prospectus of the work, as shortly and clearly as possible. This I shall do by referring to the pages, as a more ready clue than the tracts and chapters.

Of the first book, the first four folios relate to the law in general, and should more properly be entitled, *de legibus et consuetudinibus Angliæ*. From fol. 4. b. to fol. 7. might be entitled, *de personarum divisione*; and from fol. 7. b. down to the end of the first book, fol. 8. *de rerum divisione*. From thence to fol. 98, may go under the general title, *de acquirendo rerum dominio*, as in the printed copy; with, however, the following subdivisions: from folio 11 to 60, *de donatione*, with its appendages and consequences; as livery of seisin, and the like; then, gaining title by prescription, fol. 52; of incorporeal things, fol. 52. b.; of liberties and franchises, 55. b.; of confirmations, 58; in fol. 60, *de testamentis*; and fol. 62. b. *de successione*, with its consequences; as supposititious children, 69; of partition, 71. b.; of homage, 77. b.; relief, 84; custody of heirs, 86; marriage, 88. b.; dower, 92; with which the second book, *de acquirendo rerum dominio*, concludes.

The third book, from fol. 98. b. to fol. 104, may be entitled, as it is in the printed copy, *de actionibus*; from 104. b. to 112, is upon courts and different appointments of justices; then, again, from 112 to 115, upon actions; from thence to fol. 159, the end of this book, is properly entitled *de coronâ*. But the several subdivisions thereof should be as follow: fol. 115. b. of the iter of the justices and *capitula coronæ*; fol. 118, of lèse-majesty; 120. b. of homicide; 122, of the office of coroner; 123, suit and outlawry; 131, reversing outlawry; 134. b. murder; 135. b. abjururation; 138, proceeding on appeal of homicide; 141. b. of the duel; 143, of indictments; 144, of appeals *de pace et plagis*; 144. b. *de plagis et mahemio*; 145, *de pace et imprisonamento*; 146, of robbery; 147, rape; 150, *felo de se*; 150 b. of theft; 152, of provors; 155. b. of distress and replevin, which concludes the third book.

Having thus finished his discourse upon criminal suits, he begins the fourth book, which is to treat of civil actions. This goes from fol. 159. b. to 327. b. and may be divided into four lesser parts. Thus, from fol. 159. b. as far as fol. 220. b. may be entitled, *de possessione propriâ liberi tenementi*, as it contains an account of those actions for the recovery of freeholds

If this law treatise had been printed with such divisions and notification of its contents as are given in the note below, the arrangement of the whole would have struck the eye as distinctly, as it does the understanding upon perusal; it being, in truth, a comprehensive and particular account of the law, digested with a strict adherence to method and system. Consistently with the extensiveness

that were grounded upon a man's own seisin or possession. This is the first principal division: the second is, from thence to fol. 251. b. *de possessione pertinentiarum ad liberum tenementum*, that is, of actions for recovery of things appertaining to a freehold, upon the claimant's own possession of the thing: then the third division, from fol. 252, to 317. b. *de possessione alienâ*, being an account of such actions as were grounded on the seisin of another: next follows the fourth, from fol. 317. b. to 327. b. *de ingressu*, being a writ founded sometimes upon a *possessio propria*, sometimes upon a *possessio alienâ*. These are the four principal divisions of the third book; the first three of which divisions may be thus subdivided; fol. 160, of intrusion; from 161 to 220, of novel disseisin; 219, of a writ of entry upon a disseisin; 220, of *quare ejecit infra terminum*. The second contains from fol. 220. b. of rights and easements; 222, of assise of common of pasture; 229, of admeasurement of common; 229. b. of the writ *de quo jure*; 231, common of estovers; 232. b. of nuisances; 235. b. writs of entry upon a disseisin of common and nuisance; 236. b. to 237. b. of re-disseisins and execution; from fol. 237. b. to 246. b. *de assisâ ultimæ præsentationis*; 246. b. *quare impedit* and *quare non permittit*; 248, writs *ad admittendum clericum*; 251, *quare non admisit*. Here ends the second principal division. The third, beginning at fol. 252, contains from thence to 280. b. *de assisâ mortis antecessoris*; then, 281, *de consanguinitate*; 284, *de quâd permittat* for common of the seisin of another; 284. b. *de quo warranto*; next follows fol. 285, the *assisâ utrûm*; 288. b. to 296, *de convictione*; from 296 to 312. b. the writ of dower *unde nihil*; 313, *de recto de dote*; 314, *de amensuratione dotis*; 315, of waste; which concludes the third principal division: then follows the fourth division, from 317. b. to 327. b. to the end of the fourth book, *de ingressu*.

The fifth book may be entitled from fol. 334. b. to 438. b. either *de proprietate et jure* (in contradistinction to the former book), or *de actione reali*; from 439 to 443. b. *de actione personali*; 443, to the end of the book, *de actione mixtâ*. That part *de actione reali* may be subdivided thus: from fol. 327 to 332. b. is upon the writ of right; from 333 to 336. b. is of summons; from 336. b. to 364, of essoins; from 364. b. to 372. b. of defaults; 372. b. of the *intentio*; 376, of demanding a view; from 380 to 399. b. of vouching to warranty; from 399. b. to 438, is of exceptions; after which follows as before stated, that *de actione personale*, and *de actione mixtâ*.

and regularity of the plan, the several parts of it are filled with a copious and accurate detail of legal learning. The rules of property are explained; the proceedings in actions, through the minutest steps, are investigated and developed; while every proposition is supported by fair deduction, or corroborated by the authority of some adjudged case; so that the reader never fails of deriving instruction or amusement from the study of this scientific treatise on our ancient laws and customs.

If the matter of this book is more instructive and entertaining than Glanville, the access to it is rendered more easy by the style in which it is written. This is infinitely superior to Glanville, and much beyond the generality of writers of that age; being, though not always polished, yet sufficiently clear, expressive, and nervous. The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of the imperial and pontifical jurisprudence. The terms and phraseology of those two laws are borrowed by him to express the meaning of our municipal customs; and many points of law and practice are adopted from thence. The familiarity with which Bracton recurs to the Roman code, has struck many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer on English law (*a*). But the passages to which such persons

(*a*) It seems to be a fashion to discredit Bracton, on a supposition of his having mingled too much of the civilian and canonist with the common-lawyer. Any notion that has got into vogue on such a subject is likely to have many to retail it, and few to examine its justness. Among others who have most decidedly declared against Bracton, I find *Mons. Houard*, the Norman advocate. This gentleman has been at the pains to give an edition of Glanville, Fleta, and Britton; but has omitted Bracton, because his writings had *corrupted* the law of England.

take exception, if put together, would perhaps not fill three whole pages of his book ; and it may be doubted, whether they are such as can always mislead the reader. Upon a second consideration of those places where the Roman law is stated with most confidence, it will seem to be rather alluded to for illustration and ornament, than adduced as an authority : though it is visible that Bracton, with all his endeavours to give form and beauty to our own law, by setting forth its native strength to advantage, did not refuse such helps as could be derived from other sources to improve and augment it.

The value set on this work, soon after its publication, is evinced by the treatises of *Fleta* and *Britton*. These two books, the best productions of the reign of Edward I. who was an active encourager of such undertakings for improvement of the law, are nothing more than appendages to Bracton. The latter was intended as an epitome of that author, and the merit of the former is confined to the single office of supplying some few articles that had been touched lightly by him, with the addition of the statutes made since he wrote. In after-times he continued the great treasure of our ancient jurisprudence ; where the rudiments of the law were to be traced in their first formation ; where were to be seen the origin and sense of certain notions and principles ; the reason of many rules of property, and of practice, which had become obscure by the change of times ; with the causes that led to the framing

That gentleman's conceptions about the *purity* of the law of England have seduced him into a very singular theory. He lays it down, that Littleton's Tenures exhibit the system introduced by William the Conqueror in all its genuine purity ; that this system was corrupted by a mixture from other polities in the writings of Britton, Fleta and Glanville ; but more particularly in those of Bracton. Full of this preposterous idea, he has published an edition of Littleton with a commentary, and, to decide the point without more debate, has intitled it *Anciennes Loix des Francois*. After this, the admirers of Bracton will not apprehend much from this determined enemy to his reputation as an English lawyer.

of many ancient statutes, which would be unintelligible without the help of this author. Thus was Bracton deservedly looked up to, as the first source of legal knowledge, even so low down as the days of lord Coke, who seems to have made this author his guide in all his enquiries into the foundation of our law.

The author of this work is usually styled *Henry de Bracton*; though he has passed, as fancy or mistake may have dictated, by the names of *Brycton*, *Britton*, *Briton*, *Breton* (*a*). He is said to have lived at the latter end of the reign of Henry III. There is an internal evidence that the book was written before the fifty-second year of this king; for it takes no notice of the writ of entry in the *post*, nor of the regulations about distresses, attachments, guardians in socage, and other points, made by the statute of Marlbridge: and as he quotes a case in the forty-sixth year of this king (*b*), it must follow that the book was written, or at least received the author's last hand, some time between that and the fifty-second year. It is probable, that in matters of fact the writer relied on his own experience, or the information of those he personally knew; for he quotes no decision of a court, or opinion of a lawyer, but of this king's reign, though one of them is so early as the third year. It is said that Bracton was a judge.

Miscellaneous facts. The clergy continued to practise in the secular courts, in the same manner as before. We find among the provincial and legatine constitutions of this reign, several injunctions to restrain them: *Nec advocati sint clerici vel sacerdotes, in foro seculari, nisi vel proprias causas vel miserabilium prosequantur* (*c*). But these, like those which forbid them accepting other secular employments, were not observed. It appears all through this reign, that many dignitaries of the church were justices in the courts at Westminster, and in the eyre (*d*); as bishops,

(*) Dis. ad Flet. sect. 2. (b) Bract. 159. (c) Spelm. Conc. anno 1217.

(d) Dug. Or. Jur. 21.

abbots, deans, canons, arch-deacons, and the like. Notwithstanding the clergy were chosen to these stations for their learning, Bracton, speaking of some judges of his time, calls them *insipientes, et minus doctos, qui cathedram judicandi ascendunt antequam leges didicerint* (a).

In former times there had been no particular domicil, or house, for the resort and education of practicers of the law. But it has generally been believed, that very soon after the bench was fixed at Westminster, the practicers and officers of that court, as well as students of the law, began to settle in some place in London, most convenient for their studies, conference, and practice.

The title of *capitalis justitiarius*, and of *justitiarius Angliæ*, ceased in 52 Henry III. when the title first commenced of *capitalis justitiarius ad placita coram rege tenenda* (b).

The salary of the justices of the bench, in the twenty-third year of this king, was 20*l. per ann.* in the forty-third year, 40*l.* In the twenty-seventh year the chief baron had 40 marks; the other barons 20 marks; and in the forty-ninth year, 40*l. per ann.* The justices *coram rege* had in 43 Henry III. 40*l. per ann.* The chief of the bench had, in the forty-third year of this king, 100 marks *per ann.* and next year another chief of the same court had 100*l.* But the chief of the court *coram rege* had only 100 marks *per ann.* (c).

(a) Bract. 1.

(b) Dug. Or. Jur. 38.

(c) Ibid. 104.

CHAP. IX.

EDWARD I.

Statutum Walliæ—Ordinatio pro Statu Hiberniæ—Confirmations of the Charters—De Tallagio non Concedendo—Ordinatio Forestæ—Of Wreck—Wards—Of Aids—Distresses—Assises—Of Attaints—Vouching to Warranty—Attachment—Of Rape—Extortion of Officers—Spreaders of false Reports—Of replevyng Prisoners—Of Clergy—Peine forte et dure—The Office of Coroners—Warranty of Tenant per Legem Angliæ—Waste—Feigned Recoveries—Homicide se defendendo—Statute of Mortmain—Statute of Acton Burnell.

WE enter now upon a period, when the law made a very great and sudden advancement. It is generally agreed that this is, in no small degree, to be ascribed to the wisdom and activity of the prince on the throne, who through his whole reign, and indeed within the first thirteen years of it, laboured more than any of his predecessors to improve our judicial polity in all its parts. So successful were his endeavours, and so permanent have been their effects, that Edward I. has obtained with posterity the distinguished title of the *English Justinian*.

Sir Matthew Hale is very full and significant in the eulogium he bestows on this monarch. “ It appears, “ says he, that the very scheme, mould, and model of “ the common law, especially in relation to the administra- “ tion of the common justice between party and party, as “ it was highly rectified, and set in a much better light

“ and order by this king than his predecessors left it to
“ him; so in a very great measure it was continued the
“ same in all succeeding ages to this day; so that the
“ mark or epocha we are to take for the true stating of
“ the law of England, *what it is*, is to be considered,
“ stated, and estimated, from what it was when this king
“ left it (a).” The justness of this representation will be
seen in the sequel.

The reader who has gone through the last reign, is sufficiently apprized of the then state of the law, to comprehend the effect of the numerous alterations which it will receive in this. These alterations were principally made by parliamentary interposition. The statutes of this reign present a new scene to the reader, very different from that which he has passed in the preceding. We come now to a series of legislative acts, which, in all periods of the law, have been considered as constituting a necessary, yet difficult branch of study. These furnish an immediate occasion to apply great part of the detail of ancient law that has just been delivered; and as the design and effect of them will be more easily and more naturally comprehended after this preparation, it is trusted the reader will feel himself amply rewarded for the trouble and time which he has already bestowed on the history of the law. We shall explain these statutes as nearly in the order in which they were passed, as the nature of the subject will admit.

The statutes of this reign may be divided into such as relate to the rights of things, the administration of justice in general, and such as were of a political nature, and concerned objects of very high national importance. We shall speak of these latter first; and shall then be at liberty to consider the others more at leisure.

Of those which are of a political kind, the *statutum Walliæ*, 12 Ed. I. presents itself first; being a sort of con-

(a) Hale's Hist. Com. Law, 163.

stitution for that principality, which was thereby in a great measure put on the foot of England, with respect to its laws and the administration of justice. Of a similar nature, though confined to a few articles of reform, is the *ordinatio pro statu Hiberniæ*, 17 Ed. I. which gives some directions for better ordering the administration of justice in that country. These two statutes, particularly the former, are monuments of this king's wisdom in planning schemes of juridical improvement for every part of his dominions.

Such of the Britons as had fled from the Saxon invasion into Wales, preserved there, together with their language, and the blood-royal of their kings, their ancient laws and government. The descendants of Cadwallader are said to have governed in that country during all the Saxon times. When William the Conqueror established himself in England, three princes, descended from that ancient British king, reigned over Wales, then divided into three sovereignties; and kept possession of their respective dominions in defiance of the Conqueror and his successors. The way in which our kings carried on war with this people, was to make a grant to certain great lords, of such countries in Wales *as they could win from the Welchmen*. Many great lordships were by this policy conquered; and the lords held them to them and their heirs of the kings of England, as lands purchased by conquest. Such was the origin of *Lords Marchers*, who assumed every authority and prerogative that was necessary for the due execution of the laws within their respective lordships. These new establishments had a tendency to introduce the English law; which was either mixed with the Welch, or prevailed in certain places, and with respect to certain persons, in its pure state. In some lordships, in consequence of the singular mixture and mutual toleration of laws last mentioned, the English and Welch resorted to separate and distinct courts of judicature.

The lords marchers increased in number, till Llewelyn ap Gryffydd, the last prince of Wales, was slain in the eleventh year of this king. Upon this event Edward took the principality into his hands, and gave it to his son, afterwards Edward II. Since that time no more lordships marchers were erected; the Welch, in general, submitting themselves to the kings of England. Edward soon held a parliament at Ruthlan Castle, and there brought forward the following statute, for appointing a juridical establishment in Wales similar to that in England (a).

The *statutum Walliæ* begins the arrangements it is about to make, by stating what was conceived to be the political condition of that country at the time. It says, that Wales with its inhabitants had hitherto been subject to the king *jure feudali*; but that now, by the Divine Providence, it had fallen *in proprietatis dominium*, and was annexed and united to the crown of England as a part of the same body. The king therefore, wishing that the people inhabiting *Snaudon, et alias terras nostras in partibus illis* (for to such it was confined, and did not extend to all Wales, as it is now called), who had submitted themselves to the king *de alto et basso*, should be governed by certain laws as the rest of his dominions, had caused the laws and customs of that country to be rehearsed before himself and his nobles. Some of these, by the advice and counsel of his nobles, were abolished; some were permitted to remain; some were altered, and other new ones were ordained: this alteration and modification of the Welch law was as follows:

First, respecting the magistrates and officers of justice it was ordained, that the *justitiarius de Snaudon* should have the keeping of the king's peace there and in the parts adjacent, and should administer justice according to the king's writs, hereafter to be mentioned. Further, that

(a) Vid. Penn. Tour in Wales, vol. II. appendix.

there should be sheriffs, coroners, and bailiffs of commotes in Snaudon and the parts adjacent; that there should be a sheriff in *Anglesey*, one in *Carnarvon*, one in *Merioneth*, and one in *Flint*; the jurisdiction of which last was to extend to the town of *Chester*; and he was, for the future, to be attendant on the king's *justitiarius* of Chester (which officer of justice of Chester is mentioned as existing in the former reign) (*a*), and should be answerable for issues at the exchequer of Chester. Coroners were in future to be elected in these counties by the king's writ, inserted in the statute for that purpose; bailiffs of commotes were to be appointed; and they are thereby enjoined to do their duty, as directed by the *justitiarius* and the sheriff. Besides the above sheriffs, who were appointed for Snaudon and the parts adjacent, the statute directs, that there should be a sheriff in *Cardigan* and *Lampader*, together with coroners and bailiffs of commotes, as in the former.

The sheriff was to hold his county from month to month; but his tourn only twice a-year, that is, after Michaelmas and Easter. In his county he was to hold plea of the following actions, with or without a writ: of trespasses against the king's peace; of the caption or detention of cattle, or *de vetito namio*; of debt, and other breaches of contract. At his county court, he, together with the coroners, was to receive all presentments of felonies and other offences that had happened since the last county; when *Waleschery* (*b*), in case of death, was to be presented, the presentment enrolled, and the offenders prosecuted to outlawry, the same as in England: the same in appeals *de plagâ*, mayhem, rape, burning, and robbery.

All persons residing within the commote were to attend at the tourn, except religious men, clerks, and women.

(*a*) St. de Scac. 51 Hen. III. sect. 5.

(*b*) Vid. ant. 22. of Engleschery.

The sheriff was then to enquire, by the oath of twelve discreet and lawful men, concerning the *capitula coronæ*; which are inserted in the statute, and are the same, except some local matters, with those delivered to the justices itinerant in England: the jurors were next charged to make presentment of offenders, in the manner as has already been described in the proceedings of the eyre (a).

As to the coroners, it was ordained, that there should be one at least in every commote, who should be chosen *in pleno comitatu* by the usual writ, and be sworn before the sheriff to be faithful to the king, and discharge the office of a coroner with fidelity. Then the manner of holding inquisitions *super visum corporis*, and other parts of his office, in taking appeals, abjurations, and the like, are described in the same way as the office of coroner in England (b).

After this account of officers, and their duty, there follow forms of the most common original writs for the use of the inhabitants of Wales; namely, a writ of novel disseisin of freehold, of disseisin of pasture, a writ of nuisance, and of mortaucestor; a writ, or commission, appointing a justice and certain associates, whom he should chuse, *AD ASSISAS novæ disseisinæ et mortis antecessoris CAPIENDAS*; and another writ, directing the sheriff to cause all such assises to come *coram nostro justitiario*, which was the return in the above original writs. It was directed, that co-heirs, or any who could not properly have a writ of mortaucestor, should have a writ of that kind *in suo casu*, adapted to their case; by which, probably, was meant a writ *de consanguinitate*. Next follows a form of *præcipe quòd reddat, &c. quòd ei deforceat*, for cases both of right and possession. This writ, like the former, was to be returnable *coram justitiario nostro*; but it might also be had *coram justitiariis in banco*. After this there is a writ of

(a) Vid. ant. 4.

(b) Vid. ant. 12.

dower *unde nihil*, a writ of debt, and a writ of the same nature in the *detinet*, instead of *debet*; which has since been called a writ of *detinue*. This is remarkable for being the first mention of such a writ. Writs of *debt* were not to be *coram justitiario*, if for a sum under forty shillings; but such small sums were to be sued for in the county court, and in commotes. In case a plaintiff chose to sue in the county, the form of a *justicies* is given by the statute; such suits might be removed, by *pone*, *coram justitiario*. To these succeed a writ of covenant, with a *justicies* and *pone*; a writ for appointing an attorney; a writ *de coronatore eligendo*.

When the statute has given all these writs, it goes through the proceedings in each, much in the way in which those actions were conducted in England; only in the allegations of the parties, it was recommended, that the rigour of practice, which declared, *qui cadit à syllabâ, cadit à totâ causâ*, should not be tolerated. Among others, it sets forth the form of proceeding in trespass, but does not give any form of a writ.

Some alterations and regulations were made concerning property. It had not been the custom in Wales for women to have a title to dower; but now it was declared, that in future they should have dower. Inheritances that had been partible among the heirs, time out of mind, were to continue in the same manner as had been before used; only bastards were no longer to be allowed to inherit. Women, being coheiresses, were in future to have their equal shares of the inheritance, though contrary to the former custom of Wales. The people of Wales had expressly prayed that the following regulations might be established: first, that the truth of a fact might be enquired of by good and lawful men of the vicinage, chosen by the consent of parties: secondly, that in all actions for moveables, as upon contracts, debts, suretyships, covenants, trespasses, chattels, and the like, they might still retain the Welch usage; which was, that when a matter could be

proved *per audientes et videntes*, and a plaintiff had brought witnesses so qualified, whose testimony could be depended on, to prove his declaration, he should recover his demand against the adverse party; and in cases where there could not be a proof *per audientes et videntes*, that the defendant should be put to purge himself with a greater or less number, according to the quantity and quality of the thing or fact: thirdly, that in thefts, if a person was taken with the thing in his hand, he should not be suffered to purge himself, but be judged *pro convicto*: all which were granted, except only in cases of theft, burning, murder, homicide, and manifest and notorious robberies, in which the order of the law of England was to be observed.

This is the whole of the *statutum Walliæ*; which concludes with a reservation to the king of a power to interpret, add to, or diminish it as he pleased, and thought it expedient for the good of the country. After this follows, *in cujus rei testimonium sigillum, &c.* The king affixed his seal, and so executed it rather in the form of a charter, than an act of parliament. Thus was the judicial polity of the principality settled in the form in which it continued till the reign of Henry VIII. when some further steps were taken for uniting it more closely with England, by a fuller participation of our laws.

The *ordinatio pro statu Hiberniæ*, 17 Ed. I. *Ordinatio pro statu Hiberniæ.* contains eight chapters of regulations in matters of a judicial nature. It appears from this act, that the English law prevailed in Ireland with all its formalities. We find here mention of the king's writs, of assises of novel disseisin, of the king's justices, the chancery, exchequer, and the like (a). The first chapter of this statute ordains, that neither the king's justice of Ireland, nor any other officer, should purchase lands or tenements within the limits of his bailiwick, without a licence from the king, un-

(a) For English statutes binding Ireland, vid. *Harris's Hibernica*, part ii. p. 75 to 142, &c.

der pain of forfeiting such purchase to the king. No purveyance was to be made by the king's justice of Ireland, or any other officer, but in cases of necessity; and then it was to be by the advice of the greater part of the council in those parts, and by a writ awarded out of the chancery of Ireland, or out of the chancery of England, by the king's order (*a*). They were likewise forbid to arrest ships of the king's subjects who were ready to give security not to trade with enemies; and any officer of the king doing otherwise, was to satisfy the complainant in double damages, and be punished by the king (*b*). The fees for the king's seal, and those due to the marshal, were regulated (*c*). The justice of Ireland was no longer to have power of pardoning for the death of a man, or other felony, but by the special command of the king (*d*). No officer was to receive an original writ without the seal of Ireland; nor was process to be made under any other seal, except only the seal of the exchequer of Ireland, for matters peculiar to that court (*e*). Assises of novel disseisin were not to be adjourned or delayed by the writs or letters of the justice of Ireland, except only in the county where he was present, and during the time he should remain in that county (*f*).

Confirmations
of the charters. The other statutes, which we have before mentioned as of a political nature, relate to the observance of *Magna Charta* and the Charter of the Forest. During this reign several acts were passed for confirming and strengthening these great pillars of the constitution. In the 13th year of this reign, the king was intreated by the parliament to confirm all former charters of the kings his predecessors: a form of *inspeximus* and confirmation was accordingly agreed upon, not only to be prefixed to the Charter of Liberties, but also to charters of donation to individuals, as is to be seen in a public instrument, entitled, *Forma Concessionis et Exemplificationis Chartarum*, 13 Ed. I. st. 6. Further, respecting charters of donation, it was or-

(*a*) Ch. 2. (*b*) Ch. 3. (*c*) Ch. 4, 5. (*d*) Ch. 6. (*e*) Ch. 7. (*f*) Ch. 8.

dained, that should a doubt arise upon any articles therein, the matter should be argued before the treasurer and barons of the exchequer, together with the justices of both benches.

But, in the 25th year, there was a more solemn confirmation of the Great Charter, in the statute called *Confirmationes Chartarum*. This contains seven chapters. The first ordains, that the Charter of Liberties and of the Forest should be kept in every point; and that they should be sent under the king's seal as well to the justices of the forest as to others; to all sheriffs and other officers, and to all the cities in the realm; accompanied with a writ commanding them to publish the said charters, and declare to the people that the king had confirmed them in every point. All justices, sheriffs, mayors, and other ministers, were directed to allow them when pleaded before them (a); and any judgment contrary thereto was to be null and void (b). The charters were likewise to be sent under the king's seal to all cathedral churches, there to be kept and read to the people twice a year (c). It was ordained, that all archbishops and bishops should pronounce sentence of excommunication against those, who by word, deed, or counsel, did any thing contrary thereto; which curses were to be pronounced twice a-year; and if any bishop was remiss in doing this, he was to be compelled and distrained to do it by the archbishops of Canterbury and York (d).

Thus far provision was made not only for the observance but likewise for the preservation of the charters. The remaining three chapters of this statute were to guard the subject against the levying of unlawful aids. The king had, in the present parliament, obtained some aids and subsidies for maintaining a foreign war. Though these grants were with consent of parliament, they created some jealousies; an idea having prevailed, that the subject was not

(a) Ch. 1.

(b) Ch. 2.

(c) Ch. 3.

(d) Ch. 4.

bound to contribute towards carrying on the king's wars out of the realm. It is said, that on this occasion Bohun earl of Hereford and Essex, the high constable of England, and Bigot earl of Norfolk and Suffolk, and marshal of England, being personages, who, from their office in the king's armies, seemed called upon to interfere in such a crisis, presented a petition to the king this year in behalf of the commons; in consequence of which it was now ordained, that such aids, tasks, and prises, should not be drawn into custom or precedent (a). Further, the king granted for him and his heirs, as well to archbishops, bishops, abbots, priors, and other persons of holy church (who had been taxed likewise in their church-lands), as to earls, barons, and to all the commonalty of the land, that he would on no account take such aids, tasks, nor prises, *but by the common assent of the whole realm* (b), and for the common benefit thereof, *saving* the ancient aids and prises due and accustomed (c); which meant, probably, the aids due by reason of tenure. This is the first mention in the statute-book of a renunciation of right to levy money on the subject without consent of parliament. There had been a like declaration in the charter of John; but we have seen that it was omitted in that of Henry III. (d). Further, because there had been a particular outcry against a tax of forty *souds* upon every sack of wool, it was declared, this should not be again levied without the common assent and good-will of the commonalty of the realm (e).

This statute, being in the form of a charter, was sealed with the king's great seal, at Ghent, in Flanders, on Nov. 5, in the 25th year of his reign, as appears by a memorandum upon the roll. The form of excommunication pronounced by the archbishop of Canterbury against the

(a) Ch. 5. (b) *Par commun assent de tut le royaume.* (c) Ch. 6.

(d) Vid. ant. vol. I. 209, 210.

(e) Ch. 7.

breakers of it, follows in the next public instrument, entitled, *Sententia Domini R. archiepiscopi super præmissis*, stat. 25 Ed. I. stat. 2. The next notice of the two charters of liberties is in the preamble to the statute *de finibus levatis*, 27 Ed. I. where the king refers to the former confirmations thereof, and solemnly ratifies them.

In the next year, something more was done for confirming the charters. We find there the statute of *articuli super chartas*, 28 Ed. I. stat. 3. This act complains, that the charters, notwithstanding the several confirmations of them, were not observed; and this is attributed to there being no certain penalty prescribed for the violators of any points thereof. They are, therefore, again confirmed by this act; and the following method was appointed for enforcing the observance of them, and for the punishment of offenders. The charters are directed to be delivered to every sheriff in England, under the king's seal, to be read four times a-year to the people in full county; that is, at the next county after St. Michael, Christmas, Easter, and St. John. For the punishing of offenders, the commonalty were to chuse in every county court three *able men* (a), knights, or other lawful, wise, and well-disposed persons, who should be assigned and sworn justices, by the king's letters patent under the great seal, to hear and determine without any other writ than their commission, such complaints as should be made of those who offended in any point against the charters within the county, as well within franchises as without, and as well of the king's officers out of their places, as of others. They were to hear such complaints from day to day, without admitting any of the delays which were allowed by the common law; and to punish all those who were attainted of any trespass against the charters, by imprisonment, ransom, or amercement,

(a) Such is the term given by the translator to the words *prodes homes*; that is *prud' homme*, from which there is formed an abstract word, *prud' hommie*.

according to the trespass. The statute expressly declares, that this special proceeding shall only be in cases where there was no remedy before by the common law. It was enacted, that if the three commissioners could not all attend, two should be sufficient. The king's sheriffs and bailiffs were to be attendant on these justices. Besides these regulations for the observance of the two charters, several *articles*, as the act calls them, were enacted for amendment of the law, not of less importance than the above provisions. These will be considered in their proper place.

The next public act upon the subject of the charters, is the *Ordinatio Forestæ*, 33 Ed. I. stat. 5. containing some regulations about the purlieus of forests. In the next year, is the famous statute *de Tallagio non concedendo*, 34 Ed. I. stat. 4.; and another (a) statute concerning the forest, called likewise *Ordinatio Forestæ*.

De Tallagio non concedendo. The statute *de Tallagio non concedendo*, like the *Confirmationes Chartarum*, was occasioned by the question about levying money for carrying on foreign wars (b). The king had required that every freeholder of 20l. (c) *per ann.* should attend him into Flanders, or pay him a compensation in lieu thereof, to enable him to go to war with the king of France, in behalf of Guy earl of Flanders. To this the constable and marshal, who distinguished themselves on the former occasion, made an opposition, and, being supported by many potent and steady adherents, they at length compelled the king to make a similar declaration with that in the *Confirmationes Chartarum*. There was now more cause for murmuring than before; for the king had, the last year, levied a tallage on all cities, boroughs and towns,

(a) Stat. 5. (b) Of this statute vid. Mad. Exch. vol. I. 762.

(c) This is the value of a knight's fee by the statute *de militibus*, in the next reign.

without assent of parliament: to quiet his commons, therefore, as well as to satisfy his nobles, the king consented in the present statute to a parliamentary declaration about levying money. It was declared, that no tallage or aid (which included those feudal aids that had been excepted in the statute of *Confirmationes Chartarum*) should be imposed or levied by the king or his heirs, without the will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the commons of the realm (a). Nothing was to be taken by way of *male-toute* (a tax before mentioned) for sacks of wool (b). Respecting purveyance, which was in the light of a very severe tax, it was declared, as it had been on other occasions during this reign, that no officer of the king should take any corn, leather, cattle, or other goods, of any one, without the consent of the owner (c).

After these provisions concerning taxation, the following general declarations were made in favour of liberties claimed by the subject: That all men, both clergy and lay, should have their laws, liberties, and free customs, as freely and fully as they ever were accustomed to enjoy them (d); and if any thing was introduced by this, or any former law or custom, contrary thereto, it was declared null and void (e). There was at the same time a free pardon of the constable and marshal, and all their adherents, who had refused to attend the king into Flanders (f). For the better observance of the charter, it was directed, that all archbishops and bishops, for ever, should read it in their cathedral churches, and openly pronounce a curse against all those, who violated it in any point. The king put his seal to this statute, or rather charter, as

(a) Ch. 1.

(b) Ch. 3.

(c) Ch. 2. Vid. post. 28 Ed. I. stat. 3. c. 2.

(d) *Ita liberè et integrè sicut eas aliquo tempore meliùs et plenius habere consueverunt.*

(e) Ch. 4.

(f) Ch. 5.

did the archbishops and bishops, who all voluntarily swore to observe the tenure of it in all causes and articles, according to the best of their power (*a*). Thus was the statute *de Tallagio non concedendo* sanctioned with the solemnities attending the several confirmations of the charters of liberties, as a security of equal importance with those great supports of our free constitution.

Ordinatio Forestæ. The *Ordinatio Forestæ*, passed in the same year, is ushered in with a preamble expressing, very feelingly, the king's compunction for the hardships suffered by his subjects from the forest laws. One great cause of these was the abuse of indictments, which, instead of being presentments by the country, were dictated by one or two of the foresters; upon which attachments issued, and the parties were subjected to all the penalties of law, though perhaps clearly innocent of any offence. These foresters, it seems, were too numerous, and derived their whole subsistence from the plunder of the forest, in taking wood, venison, and the like to their own use. To remedy all these mischiefs it was ordained as follows: First, that all trespasses *de viridi et venatione* should be presented by the foresters within whose bailiwick they were committed, at the next swainmote, before the foresters, verderors, regardors, agistors, and other ministers of the forest; that the truth should be there enquired of by the oath as well of knights, as other good and lawful men, and the presentment sealed with the seals of the presentors, otherwise to be void (*b*); which regulation about the seals of the presentors, had been before made (as will be shewn hereafter) in regard to indictments at common law. If any of the aforesaid ministers happened in the mean time to die, the justice of the forest was to put in others, that there might be a sufficient number to make the presentment. Other officers were to be

(*a*) Ch. 6.

(*b*) Ch. 1.

appointed as before; only verderors were to be elected by the king's writ (*a*). None of the before-mentioned ministers were to be put on assises, juries, or inquisitions out of the forest (*b*). Any officer who surcharged the forest, was to be removed from his place, and imprisoned at the discretion of the justice of the forest: and at every swainmote inquisition was to be made of such surcharges and oppressions committed by the officers of the forest (*c*). The justice of the forest was empowered, in the presence of the king's treasurer, to impose fines without waiting for the eyre (*d*). These, with some regulations of a temporary kind, were all the alterations made in the system of forest law by this statute.

These are all the acts which may be considered as of a political nature. The other statutes of this king relate to the common justice of the kingdom; the principal of which are, the statute of Westminster 1, statute of Gloucester, Westminster 2d, Westminster 3d, and *Articuli super Chartas*. It is to these that Sir Matthew Hale chiefly alludes in what he says of the improvements made by this king in the administration of justice. By these, many grievous and impracticable parts of our law were corrected or removed, and others more apt and effectual substituted in their place, which have stood ever since, incorporated into, and, as it were, a part of the common law. We shall now treat of these statutes in the order in which they were made.

The statute of Westminster the first, (so called to distinguish it from two subsequent statutes, denominated likewise from parliaments holden at Westminster) is the first in this reign, and is stat. 3 Ed. I. It contains fifty-one chapters; and was ordained, says the general preamble, "because the state of holy church had been evil kept, and the prelates and religious persons of the

(*a*) Ch. 2. (*b*) Ch. 3. (*c*) Ch. 4. (*d*) Ch. 6.

“land grieved many ways, and the people otherwise en-
 “treated than they ought to be; the peace less kept, and
 “laws less used, and offenders less punished than they
 “ought to be.” It provides, therefore, in the course of
 fifty chapters, for the correction of many irregularities in
 the exercise of certain privileges and rights, and for the
 better administration of justice, both civil and criminal.
 The first chapter ordains (a) generally, that the peace of
 holy church and of the land be well kept and maintained
 in all points; and that common right be done to all, as
 well poor as rich, without respect of persons. It then
 provides against an abuse which had lain very heavy upon
 religious houses and ecclesiastical dignities. Persons who
 were descended from the founders, and officers in public
 employments, used to claim the liberty of residing there
 on their journeys, with board and lodging for themselves,
 servants, and horses; hunting in their parks, and taking
 other liberties without the consent, and generally much
 against the inclinations of the persons incroached upon.
 All such intrusions are forbid, under pain of fine and im-
 prisonment; though this restraint, says the act, was not to
 withdraw the grace of hospitality from those who needed
 it.

Of wreck.

Some points of the common law were re-
 cognised, and more firmly established. Con-
 cerning wrecks of the sea, it is *agreed*, says the statute (b),
 that where a man, a dog, or a cat, escape alive out of the
 ship, such ship or barge, or any therein shall not be ad-
 judged wreck (c); but the goods shall be saved and kept
 by view of the sheriff, coroner, or king's bailiff, and de-
 livered into the hands of such as are of the town where
 the goods were found: so that, if any within a year and a
 day sued for them, and proved them to be his, or his lord's
 or master's, and that they were lost while in his care, they

(a) Ch. 1.

(b) Ch. 4.

(c) Vid. apt. 9.

should be restored; if not, they were to belong to the king, and to be seised by the sheriff, coroners, and bailiffs, and delivered to the inhabitants of the town, who should be answerable for them, as wreck belonging to the king, before the justices: in like manner, where the wreck belonged to any other person, a breach of the above regulation was to be punished with imprisonment and fine.

A provision was made to secure the freedom of all elections; a more important object, perhaps, than it is even at this day; for, at that time, sheriffs, coroners, and other officers, who had great sway in the administration of justice, were all elected by the people. It was with a view to these, and not, probably, to any representatives of the people, that this law referred: however, as it is in general words, it may have a construction which will extend it to elections that have been appointed since for any purpose whatever. Because elections ought to be free, says the act (*a*), the king commands, that no man by force of arms, nor by malice, or menacing, shall disturb any in making a free election.

A restraint was put on purveyance (*b*): constables and chatellains were not to make prises (that is, to purvey) on persons who were not of the town where the castle was: and further (*c*), if purveyors did not pay the money they received at the exchequer, as it was a great inconvenience to the creditors of the crown, and a slander of the king, the amount was to be levied of their lands and goods; and if they had none, they were to be imprisoned. Another hardship on the public consisted of excessive tolls demanded, in some towns for the privilege of the market, in others for murage, that is, for inclosing their town: both these were restricted, under forfeiture to the king of the franchise so abused (*d*).

(*a*) Ch. 5.

(*b*) Ch. 7.

(*c*) Ch. 32.

(*d*) Ch. 31.

Such were the miscellaneous articles, regulated by this statute, that could not easily be reduced to any of the heads into which the remainder of it will divide itself. These are *tenures* and *property*, the *administration of justice*, and the *criminal law*.

The services and fruits of tenure were an endless subject of jealousy and contest in these times. We have already seen what was done in the last reign to ascertain these claims, and temper the inconveniencies resulting therefrom. The heaviest of these were ward-

Wards.

ship and marriage; and the following attempts were now made still further to regulate them. In the case of heirs being in ward to their lords (a), it was provided and declared, that *Magna Charta* should be observed (b), that their land should not be wasted. All spiritual dignities were to be kept in like manner, without spoil or waste, during their vacancy. Of such heirs, who, being in ward, married without consent of their guardians, before they were fourteen years old, it was declared, that the statute of Merton should be observed (c); and it was now further enacted (d), that those who married without consent of their guardians, after they had past fourteen years, should forfeit the double value of their marriage, as directed by that act; and moreover, that the ravisher or detainer of such ward should be answerable to the guardian to the full value of the marriage, for the trespass; and make amends also to the king, as directed by the same act. Next, as to heirs female, that lords might not prevent their marrying, in order to keep possession of their lands, it was ordained, that after they had accomplished the age of fourteen years, the lord should not keep their lands more than two years; and if in that time the lord did not marry them,

(a) Ch. 21. (b) Namely, c. 4, 5, 6. Vid. ant. vol. I. 236.

(c) Namely, c. 6. Vid. ant. vol. I. 261. (d) Ch. 22.

they were to have an action to recover the inheritance, without giving any thing for wardship or marriage. But, on the other hand, if a female ward wilfully refused a marriage provided by her guardian, being such as would not disparage her, he was entitled to hold the inheritance till she was twenty-one years old; and further, till he had taken the value of the marriage.

In protection of wards it was provided, by another act (a), that if a guardian or chief lord infeoffed any one of land that was the inheritance of a child who was in ward, to the disherison of the heir, the heir should recover by assise of novel disseisin against the guardian and the tenant: and if the land was recovered, the seisin should be delivered by the justices to the next friend of the heir, to whom the inheritance could not descend, who was to improve it for the use of the heir, and answer for the issues, when he came of age. If the infant was carried away, or any wise disturbed in pursuing the remedy here given, the assise might be brought by his next friend.

Another burthen of tenure was, the aids demanded by the lord *pur faire fil chevalier*, and *pur file marier*. These had never been ascertained (b); but had been levied at the discretion of the lord, who sometimes exacted unreasonable supplies in this way, and those much oftener than was necessary. It was therefore declared (c), that, for the future, there should be taken of a knight's fee 20 shillings only; and the same sum for land in socage of 10 pounds; and so in proportion. This was not to be levied for making the lord's son a knight, till he was fifteen years of age; nor for the marriage of his daughter, till she was seven. If the father died before he had married his daughter, his executors were to be answerable out of his goods for the sum levied; and should the goods

Of aids.

(a) Ch. 48.

(b) Vid. ant. 105.

(c) Ch. 36.

be insufficient, the heir was to be charged therewith. Thus far of the fruits of tenure, and of property in land.

Next as to the administration of justice. Before we consider such provisions as related to the discussion of causes, with the process and proceedings therein, we shall first mention those made for putting the special remedy by

Distresses. distress on a foot of convenience and effect. The provisions made by the statute of Marlbridge were of an important nature; and as they touched the mischief then mostly prevalent, it was above all things to be desired, that they should be enforced. The first statute of this reign is, in effect, nothing more than an injunction to observe it; for it says (*a*), that some persons take, and cause to be taken, beasts, and chase them out of the county, which is hereby forbid; and if any offend against this injunction, they shall be fined as directed by the statute of Marlbridge (*b*); as shall those who take beasts wrongfully, and distrain out of their fee; who shall, besides, be punished in proportion to the trespass. Thus this act is a confirmation of the statute of Marlbridge; with these differences: that statute speaks only of distresses; this, of all *takings*: that prohibits *all* distresses; this, only distraining of *beasts*: that concerns those *who take*; this extends to those *who cause* to be taken (*c*).

The next statute on the subject of distresses goes much further towards removing this peculiar remedy from the hands of individuals, and submitting it to the officers of justice. It is provided (*d*), that if any take the beasts of another, and cause them to be driven into a castle or fortress, and there withhold them against gages and pledges, whereupon they are solemnly demanded by the sheriff, or some other bailiff of the king; the sheriff or bailiff, at the suit of

(*a*) Ch. 16.

(*b*) Viz. ch. 4, 2, and 15. Vid. ant. 67, 68, 69.

(*c*) 2 Inst. 191.

(*d*) Ch. 17,

the plaintiff, taking with them the power of the county or bailiwick, should endeavour to make plevin of the beasts taken; and if any obstruct them, or there is no one belonging to the lord or taker to give an answer, or make deliverance, he shall be warned of the matter; and if he does not forthwith deliver the cattle, the king, for the trespass and despite, shall cause the castle or fortress to be beaten down, and no permission shall afterwards be given to rebuild it. The plaintiff shall be recompensed by the lord, or him that took the beast, in double damages, for all the loss he sustained after the first demand made by the sheriff or bailiff: and if he that took the beasts has not wherewith, the lord shall make the recompence upon the spot, at the time the sheriff or bailiff makes the deliverance. It was further directed, that, in cases where the sheriff ought to deliver the king's writ to the bailiff of the lord of such castle or fortress, if the bailiff will not make deliverance, the sheriff (not waiting for a writ of *non omittas*, as heretofore) shall do his office without further delay; and not only where the writ of replevin is issued, but also upon a plaint, as authorized by the statute of Marlbridge (*a*). The statute says, if these violences were committed in the marches of Wales, or any where else where the king's writ runneth not, the king, who was sovereign lord over *all*, should do right to those who complained; a clause which at once asserted the king's dominion over that country (*b*), and left the measure of its exercise at his discretion.

The first object that draws our attention in considering the administration of justice, is the jurisdiction of courts. Some provision was made towards abolishing inconvenient customs, and regulating the order of hearing and deciding causes.

A singular custom had prevailed in many cities, boroughs, and towns corporate, that if any person of one city,

(*a*) Vid. ant. 69.

(*b*) This was seven or eight years before the conquest of Wales, and the making of the *Statutum Wallie*. Vid. ant. 94, 95.

society, or merchant-guild was indebted to some one of another city, society, or merchant-guild, and if any other of that city, society, or merchant-guild came into the city, society, or merchant-guild, where the creditor was, that the creditor might charge such foreigner with the debt of the other (a). It was this custom that occasioned the following statute (b), which enacts, that in no city, borough, town, market, or fair, should any foreigner be distrained for a debt, of which he was not the debtor or surety; and such distress was to be immediately delivered by the bailiff of the place, or the king's bailiff, and the offender to be grievously punished.

There was another instance, though not so singular as the former, where these local jurisdictions exercised an authority that required some correction. Great men, and others who had particular jurisdictions to hold plea of contracts, covenants, and trespasses, when they were made or done within a certain precinct, would attach persons, who happened to be within their franchises, by their goods, to answer in their courts of contracts, covenants, and trespasses, which had happened out of their franchise; pretending the same were *transitory*, and, as such, might *be supposed* to be done within the franchise. This was greatly to the prejudice of the king's courts, and of the crown, which lost its fines and amercements; and it brought great inconvenience on the party, who was a stranger, held nothing of the franchise, and was only passing through it. It was enacted therefore (c), that any one who should cause a foreigner to be so attached, should recompense him in double damages. Upon this act have been formed two writs: the one, in nature of a prohibition before the suit begun, commanding that the party should not be arrested contrary to the form of this statute; the other, after the commencement of the suit, to recover the penalty of double damages, and the goods distrained (d).

While measures were taking to secure the king's courts in possession of the proper objects of their cognizance, it

(a) Fleta, lib. 2, c. 56. 2 Inst. 204. (b) Ch. 23. (c) Ch. 35.

(d) Reg. 98. 2 Inst. 230.

was necessary to facilitate the dispatch of causes there, as much as possible. There was room for regulation in this particular. The method of hearing causes in the superior court had become very preposterous and disorderly. Many times the judges, yielding to the importunity of great men, and others, especially in the late turbulent reign, would put off the business of the day to some future time; and at that time, perhaps, hear some other matter appointed for a subsequent day: so that causes were delayed, parties disappointed, expences incurred; and after all, when the matter was to be heard, the parties had neither advocate, witnesses, or any thing in readiness (*a*). To remedy this, it was provided and commanded, as the act says (*b*), by the king, that the justices of the king's-bench, and of the bench at Westminster, should decide all pleas that stood for determination at one day, before any new matter was arraigned, or new plea commenced the day following.

Another impediment to the administration of justice arose from the canons of holy church, which forbade, under pain of excommunication, that any man should be sworn on the evangelists, or that any secular plea should be held at certain seasons. These are stated by Britton to be as follows: from the Septuagesima to eight days after Easter; from the beginning of Advent to eight days after Epiphany; in the Ember-days; the days of the great litanies; the Rogation-days; the week of Pentecost; in the time of harvest or vintage, that is, from the feast of St. Margaret, 13th July, until fifteen days after the feast of St. Michael the Archangel; and in the solemn feasts of the acts of the saints. All these times, says our author, were allotted for prayer, to silence debate, to reconcile those that were at strife, or to gather the fruits of the earth; being works either of piety or charity (*c*). If these seasons are compared with the scheme of *dies communes in banco*, in the former reign (*d*), they will be found nearly to fill up all the

(*a*) 2 Inst. 256.(*b*) Ch. 46.(*c*) Britton, c. 53.(*d*) Vid. ant. 48.

remainder of the year that was not occupied by the Terms, and, indeed, to incroach upon some of them. The circuits of the justices therefore, which, no doubt, were always held in the vacations, and sometimes part of a term, could not, consistently with the canons, be held without a dispensation; for which reason some of those seasons, that stood most in the way, were now broke in upon. Forasmuch, says the act (a), as it is great charity to do right to all men, at all time, when need shall be, it was provided, by the assent of all the prelates, that *assises of novel disseisin, mortaucestor, and darrein presentment*, should be taken in *Advent, Septuagesima* (b), and *Lent*, as well as *Inquests* (c). This general standing dispensation of the canon in future was obtained of the bishops at the special instance of the king.

Assises.

The remedy by assise was extended by several statutes to cases where it before had no effect. One was, where escheators, sheriffs, and other bailiffs, under colour of their office, would seize into the king's hand the freeholds of individuals. The disseisee, in this case, had no remedy but to sue by petition to the king: but now it was enacted (d), that he might either pursue the old course, or bring a writ of novel disseisin; in which he should recover double damages, and the offender should be amerced to the king. A provision was made respecting

(a) Ch. 51.

(b) If *Septuagesima* means here the same period as in the passage just quoted from Britton, it must include *Lent*; which therefore need not have been added, but *ex abundanti cautela*. If that is not the sense, it can signify only the Sunday, which seems an absurd provision. In like manner *Quaresme*, which is the next word in the original, either means from *Quadragesima* the first Sunday in *Lent* to the end of it, or the whole of *Lent* from *Ash-wednesday*. In the year 1786, from *Septuagesima* Sunday to eight days after *Easter*, is from February 12 to April 24. The *Quadragesima* is on March 5, and *Lent* ends April 9. *Advent* begins on 26th November, and ends 14th January.

(c) The expression in the statute seems to convey, that inquests used to be taken before at those seasons. This must have been by a dispensation.

(d) Ch. 24.

disseisins, which seems to be merely an affirmance of the common law (*a*). It is for that reason, probably, that the act says, it was provided and *agreed*, that if any one be attainted of disseisin, with robbery of goods, and it be found by the recognitors in an assise of novel disseisin, the judgment should be to recover his damages, as well of the goods as the freehold; and the disseisor should make fine, and, if present, be ordered to prison: and so was it to be in all cases of disseisin with force and arms, though there was no robbery of goods (*b*).

In cases of disseisin, if it happened either that the disseisee or disseisor died, leaving an heir within age, and a writ of *entry sur disseisin* was brought by the heir of the disseisor being within age, we have seen, that the practice was for the parol to demur, until the full age of each respectively (*c*). This occasioned great delay, and contributed rather to confirm the injury of the disseisor and wrong-doer. To correct this, it was provided (*d*), that for the nonage of the one party or the other, in the above cases, the writ should not be abated, nor the plea delayed; and if it came to a trial, and the verdict was against the heir of the disseisee, he should have a conviction, or attaint (as it was now more commonly called) of the king's special grace, without paying any thing. So equitable did they think it to take care that the infant, who was by this act precipitated into a contest at law, to which by the old practice he was not liable, should be protected by every legal means. The attaint, as it should seem, not being a writ, that was granted of course.

Attaints had just before come under the contemplation of the legislature (*e*), when the first Of attaints. parliamentary provision was made respecting this peculiar and severe proceeding against jurors. "Forasmuch, says that statute, as certain persons of this realm doubt very little to make a false oath, whereby many people are dis-

(*a*) Vid. ant. vol. I. 331.

(*b*) Ch. 37.

(*c*) Vid. ant. vol. I. 469.

(*d*) Ch. 47.

(*e*) Ch. 38.

“herited, and lose their right; it is provided, that the king, of his office, shall from henceforth grant attaints upon inquests in plea of land, or of freehold, or of any thing touching freehold, when it shall seem to him necessary.”

Many doubts have arisen upon this act. Some are of opinion, that though an attaint did lie upon a false verdict given in a plea of land, yet the king, sometimes, would not grant it without a special suit made to him; which produced great delay, trouble, and expence. The reason of this difficulty in obtaining an attaint in a plea real, more than a plea personal, they say, was, that in the latter, the party grieved had no remedy but an attaint, which should therefore be of course; but that in pleas real, he might resort to an action of a higher nature, and therefore this extraordinary redress was not absolutely necessary. Others have been of a contrary opinion; namely, that an attaint did not at common law lie in *all* pleas real; and therefore this act provides, that the king shall grant it *ex officio*, that is, *ex merito justitiæ* (a). Upon the whole, it seems to be the opinion of lord Coke (b), that an attaint lay at common law, both in pleas real and personal; and he founds that opinion, as he supposes, upon ancient writers and records.

However, it should seem, from the face of our statute-book, that this writ was not so general as is stated by that learned author (c). For, to say nothing of the statute now before us, we find by stat. 1 Ed. III. sect. 6. that an attaint was thereby granted in a *writ* of trespass; and it is remarkable, that by stat. 5 Ed. III. c. 7. an attaint is granted as well in pleas of trespass *without* writ, as by writ; from which it looks extremely likely, that each of these was an enlargement of this remedy, which extended

(a) 2 Inst. 237.

(b) 2 Inst. 130.

(c) In confirmation of the statute-book, vid. Rot. Parl. 18 Ed. 1. Petit, No. 93. Attaint denied in trespass; and *The Mirroir*, where that writer complains of it as an abuse of the common law, that attaints did not lie in pleas personal as well as pleas real. This author, as is supposed, lived towards the close of the reign of Edward II. just before those acts of Edward III. were made. *Mirroir*, Ch. 5.

no further than the express words of the statutes would carry it. Thus might lord Coke's opinion be shaken, by merely looking into the statute-book; but it is evident from the former part of this History, that an attaint lay only against jurors in assises, when the assise was taken *in modum assisæ*, and not at all in other cases of freehold, nor in any personal action whatsoever.

It is true that, from a passage in Bracton (*a*), we must conclude that the writ of attaint was not, even in these cases, obtained in the ordinary course of the chancery, if the party had suffered any time to elapse; but that after a length of time the king was to be specially petitioned to allow it. However, it seems harsh to put any other construction upon this statute than the following: that perjury had grown so common, it was become necessary to declare, that an attaint should be had not only in an assise when taken in *modum assisæ*, but in all *inquests* in pleas of land or of freehold, or of any thing touching freehold.

If it is necessary to draw any particular inference from the words *de son office*, perhaps the following may be as natural as that abovementioned; not that the king shall grant these writs whenever applied for, *ex merito justitiæ* (a sense which the words *ex officio* surely never bore in any writer of Latin, whether good or bad), but that the king shall *ex officio*, without being sued and applied for, grant writs of attaint to make inquiry of the perjury of jurors. This is the true sense of *ex officio*; and this construction is supported not only by the earnestness with which the statute complains of the crime, but by the words annexed to the grant of this new power to the king, *when it shall seem to him necessary*.

We have seen (*b*) that the champion in a writ of right was to swear *de visû et auditû proprio*, or that of his father; but things were so altered, that we find a statute made in

(*a*) Vid. ant. vol. I. 370.

(*b*) Vid. ant. vol. I. 429.

this parliament (a) to the following effect: "Because it
 " seldom happened, but that the champion of the de-
 " mandant is forsworn, in that he sweareth that he or
 " his father saw the seisin of his lord or his ancestor, and
 " his father commanded him to deraign that right;" it is
 provided, that henceforth the champion of the demandant
 shall not be compelled so to swear. But the old oath in
 other points was to be observed.

Several provisions were enacted to facilitate the course
 of proceeding and process in actions. In a writ of dower
unde nihil habet, the old plea of the tenant, whereby it
 used to be objected that she had received her dower of
 another man before the writ purchased, was taken
 away (b); unless the tenant could shew that she had
 received part of her dower of himself, and in the same
 town, before the writ purchased.

Vouching to Vouching to warranty and casting essoins
 warranty. were put under some wholesome restrictions.
 These indulgencies had been too much abused. In all
 real actions, the tenant was permitted to vouch any per-
 son, though he or any of his ancestors never had any
 thing in the land whereof he might infeoff the tenant, or
 any of his ancestors. Again, the person vouched might
 in like manner vouch another; and when we consider that
 upon every summons *ad warrantizandum*, there must be a
 lapse of several months before a return of the writ could
 be had, the delay was infinite; while every voucher per-
 haps was false. To remedy this, it was provided as fol-
 lows (c): First, as to writs of possession, as those of
mortuuncestor, *cosinage*, of *aiel* (a writ in nature of a
mortauncestor) (d), *nuper obiit* (for so they now called a
writ de propurte), of intrusion, and other similar writs; if
 the tenant vouched to warranty, and the demandant

(a) Ch. 41.

(b) Ch. 49.

(c) Ch. 40.

(d) Vld. ant. Vol. I. 363.

counterpleaded it, and averred by assise or by the country, or otherwise, as the court should award, that the tenant or his ancestor, whose heir he was, was the first that entered after the death of him of whose seisin he demanded the land; then the averment of the demandant should be received, if the tenant would abide thereon; and if not, and he had not his vouchee ready to enter immediately into the warranty, he should be compelled to answer over; saving to the demandant such exception against the vouchee, if he would vouch over, as he had against the first tenant.

Moreover it was provided, that in writs of entry which made mention of degrees, none were to vouch out of the line there mentioned. As to writs which made no mention of degrees; as the writ of *entry in the post*; those writs, says the statute, shall not have place, but where the other writs naming the degrees could not be maintained (*a*). If the demandant would aver, that neither the vouchee nor his ancestor had ever seisin of the land or tenement demanded, nor fee or service by the hands of his tenant, or his ancestors, since the time of him on whose seisin the demandant declared, until the time the writ was purchased, whereby he might have infeoffed the tenant or his ancestors; the statute directs this counterplea should be allowed in the before-mentioned writs of possession, as well as in a writ of right. After all these checks upon vouching, the statute, notwithstanding, has a saving for tenants, who, though ousted of their voucher by the counterpleas above-mentioned, yet might, perhaps, really have a charter of warranty: as if a person, who neither himself nor any of his ancestors ever had any thing in the land, released to the tenant with warranty; and a writ was brought against the tenant, and he vouched the releasor, and the demandant counterpleaded the voucher

(*a*) Vid. ant. 72.

under this statute, namely, that neither he nor his ancestors ever had any seisin; then the tenant was ousted of his voucher; but yet, by the saving here made, he was to have his remedy over by a writ of *warrantia chartæ* (a).

Essoins were as great a grievance in judicial proceedings, as vouching to warranty. To limit these also, it was provided (b), that because in writs of assise, attain, and *juris utrūm*, for so the *assisa utrūm* was now called (where the jurors, being returned the first day, suffered most by delays), the jurors had been troubled by reason of the essoins of tenants; therefore, after the tenant had once appeared in court, he should be no more essoined, unless he would make his attorney to sue for him; and if not, it was enacted, that the assise or jury (c) should be taken by default.

There was an instance in which the delay of essoins was carried to an infinite length: that was, where there was an essoining *simul et vicissim*, or as it was now called, a *fourcher by essoin*; as when a *præcipe* was brought against two or more tenants, and after each had had one essoin, which was by law due to them, they further delayed the demandant by alternately successive essoins. As for instance, a *præcipe* is brought against *A.* and *B.* *A.* is essoined, and *B.* appears, and hath *idem dies* given him; at which day *A.* appears, but *B.* casts an essoin: at the *dies datus* *A.* is essoined again, and *B.* appears; and so alternately: this was called *fourcher*, that is, *to divide*; because they divide themselves, in delay of the demandant by essoins and appearances, interchangeably (d). The excess to which this practice was now carried, had crept in since the time of Bracton; or at least it was discountenanced by that author; for he lays it down ex-

(a) 2 Inst. 240, 245.

(b) Ch. 42.

(c) *L'assise ou la juree*, to comprehend the two characters the recognitors might by possibility appear in at the trial.

(d) 2 Inst. 250.

pressly, that an essoin, in such case, should not be allowed at every appearance, on account of the infinite delay it would occasion (*a*). The statute made to remedy this abuse (*b*) recites, that "forasmuch as demandants are often delayed, by reason that many parceners are tenants, of whom none can be compelled to answer without the other; or the tenants may be jointly infeoffed, in which case none may know his several right; and such tenants often *fouch* by essoin, so that every one of them has a several essoin;" it therefore enacts, that for the future such tenants shall not have an essoin, but only at one day, as a sole tenant has; so that they shall no more *fouch*, but have only one essoin.

Of all the various essoins, none put so effectual a stop to justice as that *de ultra mare*; by which persons would essoin themselves, though they were really within the realm the day of the summons. It was ordained (*c*), that this essoin should not always be allowed, if the demandant would challenge it, and be ready to aver that the tenant was in England the day of the summons, and three weeks after; but it should be adjourned in this form: that, if the demandant was ready at a certain day, by averment of the country or otherwise, as the court should award, to prove that the tenant was within the four seas the day he was summoned, and three weeks after, so that he might be reasonably warned by the summons, the essoin should be turned into a default (*d*).

Thus far of these obsolete parts of our ancient jurisprudence; which we have ventured to treat so fully, that the history of our law may be better understood, and the causes and effects upon which the changes of our jurisprudence have at different periods turned, may be clearly distinguished.

(*a*) Vid. ant. vol. I. 410. (*b*) Ch. 43. (*c*) Ch. 44. (*d*) Vid. ant. vol. I. 404.

We have seen what the *solennitas attachiamentorum* was in the last reign (*a*). The great delay occasioned by this tediousness of process made it necessary to shorten it very considerably. This design was begun by the statute of Marlbridge, which ordained, that the second attachment should be *per meliores plegios*, and then should go the last or great distress (*b*). Another step of this process was now taken off; for it was ordained (*c*), that should the tenant or defendant, after the first attachment returned, make default, *immediately* the great distress should be awarded; and if the sheriff did not make sufficient return thereof upon a certain day, he should be amerced. If he returned, that he had done execution in due manner, and the issues were delivered to the mainpernors, then he was commanded to return issues, at another day, before the justices. If the party came in at the day to save his default, he was to have the issues. If he came not, the king was to have them; that is, the justices of the king were to cause them to be delivered to the wardrobe; the justices of the bench at Westminster were to deliver them to the exchequer; the justices in eyre to the sheriff of the county.

A new time of limitation was fixed in the following manner: In conveying a descent in a writ of right, it was enacted (*d*), that none should presume to declare of the seisin of his ancestor beyond the time of king Richard; which has since been always construed to mean the first day of that king's reign. Writs of novel disseisin, and of partition, commonly called *nuper obiit*, were to have limitation from the first voyage of Henry III. into Gascony, which was in the fifth year of his reign (a period that had been fixed for assises of novel disseisin by the statute of Merton) (*e*);

(*a*) Vid. ant. vol. I. 481, &c. (*b*) Vid. ant. 75. (*c*) Ch. 45. (*d*) Ch. 39.

(*e*) For the limitations fixed by the statute of Merton, vid. ant. vol. I. 264. For the limitation of the seisin in a writ of right, vid. ibid. 427.

writs of *mortauncestor*, of *cosinage*, of *aiel*, of entry, and *de nativis*, from the coronation of Henry III. These continued the periods of limitation till the reign of Henry VIII. when the policy of measuring the time of limitation, for commencing actions, by a certain number of years, was adopted in the place of these fixed periods. The prohibition about *beaupleader*, made by the statute of Marlbridge (a), was revived and enforced (b).

While these improvements were made in the practice of our civil courts, the legislature provided for the due administration of the criminal law, by defining crimes, but more particularly by contriving modes of prevention and punishment.

It should seem, that sheriffs in their tours, and lords in their leets, had exercised that part of their criminal jurisdiction which related to escapes with too little discretion; for it was enacted (c), that nothing be demanded, taken, or levied, by the sheriff, or by any other, for the escape of a thief or felon, until it be judged an escape by the justices in eyre.

The crime of rape, which, in ancient times, had been felony, and punishable with death, had, in the last reign, been considered in a less heinous light, and punished only by certain mutilations, which were thought peculiarly adapted to the offence (d). This species of punishment continued till the legislature once more changed it. The king, says the statute (e), prohibiteth, that none do ravish, nor take away by force, any maiden within age, neither with nor without her consent; nor any wife or maiden of full age (that is, twelve years old, being the age of consent), nor any other woman against her will: and if any do, the king shall do common right, at his suit that will sue within forty days; and those who are found guilty shall

(a) Vid. ant. 70.

(b) Ch. 8.

(c) Ch. 3.

(d) Vid. ant. 38.

(e) Ch. 13.

be punished with two years imprisonment, and fine at the king's pleasure. If they have not whereof to make fine, the imprisonment shall be increased in proportion to the enormity of the trespass. We shall presently (a) see that this new penalty was changed by parliament to the old one of felony.

Trespasses (b) in parks and ponds, which were thought not sufficiently punished by a compensation in damages only, were to be punished by imprisonment and fine at the king's suit (c); and, says the statute, if tame beasts or other thing in the park were taken in the way of robbery, the common law shall be executed upon the offender, as upon one who had committed open theft and robbery.

Several laws were made to guard against the misconduct and extortion of officers of courts, who, from their situation, were enabled to throw obstacles in the way of justice, and so confer favours, or work oppression, to answer their private views. A short mention of these provisions may not be unentertaining, as they tend to shew the difficulty under which the administration of justice laboured at that time.

Extortion of
offices. We have before taken notice of a remedy contrived for those who were disseised by escheators, sheriffs, and bailiffs, *colore officii* (d). It was now ordained, that no officers of the king, either by themselves or any other, should *maintain* suits or matters depending in court, *to have a part* or profit out of the thing in question, according to an agreement made between them, under penalty of being punished at the king's pleasure (e). No sheriff, or other officer, was to take any reward for doing his office, but was to be content with the king's pay, under

(a) Vid. post. stat. Westm. 2. c. 34.

(b) Vid. ant. vol. I. 266. where the great lords wanted authority to punish such trespassers with a short hand; but the king refused to concur in a statute for that purpose.

(c) Ch. 20.

(d) Vid. ant. 116.

(e) Ch. 25.

penalty of forfeiting double the sum taken, and being likewise punished at the king's pleasure (a). One article of expence to the subject in the circuits was, delivering out the *capitula coronæ*; which, it was ordained (b), should, for the future, be the privilege of the justices clerks only; and they were not to take more than two shillings of every hundred or town out of which a jury of twelve or six appeared, who were each to have a duplicate of the *capitula*. Prior to this statute, probably, not only the clerks of the justices, but of escheators and other ministers and officers that followed the eyre, used to write out these *capitula*; and, most likely, reduced the value of a perquisite which, it was thought, should belong to the clerks of the justices (c). If a justice's clerk exceeded the sum here allowed, or any one else took upon him to make out the *capitula*, he was to pay thrice as much as he received, and lose his office for a year. It was also ordained (d), that no clerk of the king, nor of any justice, should accept a presentation to a church, concerning which any plea was then depending in the king's court, without special licence from the king, under pain of the church being declared void, and of losing his office. At this time many ecclesiastical persons were not only clerks in the chancery, and other of the king's courts, but also stewards of the household to noblemen and other great men, and were therefore in situations to procure favour or discouragement in suits (e). It was further ordained, that no clerk of any justice or sheriff should take part in matters depending in the king's courts, nor commit any fraud whereby common right might be disturbed or delayed.

There was great complaint that officers, cryers who had an inheritance in their office, and the marshals of justices in eyre, took money of such as recovered seisin of land, or other thing depending in suit; and that fines were levied

(a) Ch. 26.

(b) Ch. 27.

(c) 2 Inst. 211.

(d) Ch. 28.

(e) 2 Inst. 212.

of jurors, towns, prisoners, and others attached upon pleas of the crown; which abuse was in a great measure owing to the excessive number of those officers. Several penalties were enacted to punish offences and extortions of this kind (*a*).

During the late dissolute times, mal-practices seem not to have been confined to inferior offices, but to have run through all ranks of persons attendant upon courts. The following provision was occasioned, no doubt, by an experience of this kind. It was ordained (*b*), that if any serjeant pleader (*c*), or other, do or consent to any manner of deceit or collusion in the king's court, in order to deceive the court or party, he shall be imprisoned for a year and a day, and shall never after be permitted to plead in that court. If the offender should not be a pleader, besides the imprisonment, he was further to be punished at the king's pleasure, according to the degree of the offence.

We have an instance where corruption and cabal had got upon the bench of justice. It has been seen, that by the statute of Merton (*d*), every free suitor of the county and other courts might make his attorney to do suit there for him. Under colour of this licence, two mischiefs ensued: first, barrators, and maintainers of quarrels (*e*), were encouraged by the sheriff to become attornies, to make suit; and accordingly, amongst the other suitors, to give judgment, and sometimes, perhaps, take the lead in pronouncing judgment for, and in the name of, the other suitors: secondly, stewards of great lords, and others, who had no letters of attorney, as required by the statute, would do the like (*f*). These were the mischiefs intended to be removed by the following law (*g*), which ordained that no sheriff should suffer any barrators, or maintainers of suits in their county courts, nor permit either stewards of great

(a) Ch. 30. (b) Ch. 29. (c) In the original *Serjaunt countre*.
(d) Viz. c. 10. Vid. ant. vol. I. 265. (e) *Querells* may signify complaints, suits.
(f) 2 Inst. 225. (g) Ch. 33.

lords, or any other (unless he was attorney for his lord) to make, give, or pronounce judgment, if he was not specially so commanded by all the suitors, and attornies of suitors, then present in court; and should any one act otherwise, the sheriff, as well as the offender, was to be grievously punished at the pleasure of the king.

Thus far of offences against the admini- Spreaders of
stration of justice. There remains only one false reports.
crime, which we shall first mention, before we speak of the regulations made for the improvement of criminal judicature: this is the spreading of false and slanderous reports. The cause of this act is stated in the preamble (a): "Forasmuch as there have been oftentimes
" found in the country devisers of tales, whereby discord,
" or occasion of discord, hath many times arisen between
" the king and his people, or great men of the realm;" as had been lately experienced in the unsettled reign of Henry III.; therefore it was commanded, that from henceforth no one be so hardy as to tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the king and his people, or the great men of the realm; and whoever does so, shall be taken and kept in prison until he has brought into court the first author of the tale. This, from the nature of the thing, became the severest punishment that could well be devised, as it might amount to perpetual imprisonment.

Respecting the office of magistrates, it was provided in the following manner. First, as to coroners. It seems, that of late many mean and unfit persons had been chosen into that office, though the proper qualification for such an officer was that of *probus, legalis, et sapiens*. It was now ordained, that (b) sufficient men should be chosen coroners, of the most wise and discreet knights, who were

(a) Ch. 34.

(b) Ch. 10.

best skilled and willing to attend their duty; and such should lawfully attach and present pleas of the crown. It was further directed, that sheriffs should have counter-rolls with the coroners, as well of appeals as of inquests, of attachments, or of other things which belonged to that office; and no coroner was to take any fee for doing his office. The particular duties of this important office were more particularly marked out by a subsequent (a) statute, of which we shall take notice in its proper place.

It had been the practice for the common fines and amercements before justices in eyre to be assessed promiscuously by the sheriff, and, as the statute says, by barrators; and upon those who were innocent, as well as upon the guilty; all which was transacted after the justices were gone. These fines were paid to the sheriff and barrators. To remedy this, it was provided (b), that henceforth such sums should be assessed in the presence of the justices in eyre, before their departure, by the oaths of knights and other honest men, upon those who ought to pay; and the justices were to cause the sums to be put into *estreats*, which were to be delivered into the exchequer.

The chapter of *Magna Charta* concerning the reasonableness of amercements (c), was re-enacted in more comprehensive terms: for whereas that provision says, *LIBER HOMO non amerciatur, &c.* and so was confined to natural persons, or, at furthest, to *sole* bodies politic; this statute of Edward I. (d) extends it to *cities, boroughs, and towns*.

Because the method of pursuing felons by fresh suit had not been so much attended to as formerly, and great obstruction was occasioned thereto by franchises, an act was made to enforce this common-law prosecution. It is directed (e), that all persons in general should be ready and

(a) Stat. 4 Ed. I. st. 2. *de officio coronatoris*.

(b) Ch. 18.

(c) Ch. 14. Vid. ant. vol. I. 247.

(d) Ch. 6.

(e) Ch. 9.

apparelled, at the command and summons of the sheriff and cry of the country, to sue and arrest felons, as well within franchises as without. Those who neglected or refused, were to be fined at the king's pleasure: and if default was made by the lord of a franchise, he was to forfeit his franchise to the king; if by a bailiff, he was to be imprisoned two years. The sheriff, coroner, or bailiff, who shewed any favour to a felon, or concealed felonies committed within his district, was to suffer a year's imprisonment, and afterwards pay a grievous fine; or, should he not have wherewith to pay, he was to suffer imprisonment for three years.

Some laws were made for ordering of Of replevyng offenders, when taken. It sometimes hap- prisoners. pened, that persons committed for murder would sue out the writ *de odio et atia*, and, obtaining a favourable inquest before the sheriff, would get themselves replevied till the coming of the justices in eyre. To prevent unfair inquisitions in these cases, it was ordained (a), that such inquests should be taken by lawful men, chosen by oath (of whom two at least were to be knights), who had no affinity with the prisoner, nor were for any other reason to be suspected.

But, in this article of replevyng offenders, suspicion of favour and malice went further than the jurors; for it is stated, in a statute which we are now going to mention, "that sheriffs and others who had the custody and imprisonment of persons (b) charged with felony, used to let out such as were not properly replevisable, and kept in prison such as were, that they might gain of the one party, and grieve the other." For this reason, and because it had not been hitherto particularly determined who were replevisable, and who not, except in the case of persons taken for the death of a man, or by command of the

(a) Ch. 11. Vid. ant. 14.

(b) *Rettez de felonie.*

king, or of his justices, or for the forest, it was therefore expressly enacted (a) what offenders should, and what should not be replevisable. First, the following persons were in no wise to be replevisable; neither by the common writ, that is, the writ *de homine replegiando*, nor without writ, that is, *ex officio*, by the general discretion intrusted to sheriffs in this point; namely, persons outlawed; those who had abjured the realm; provors; those taken with the manor; those who had broken the king's prison; thieves openly defamed and known; such as were appealed by provors, so long as the provors were living (if they were not of good name); such as were taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal; persons excommunicated who were taken at the request of the bishop; those taken for manifest offences, or for treason touching the king's person. The following persons might be let out by sufficient surety; but the sheriff was to take nothing for so doing, and was to be answerable for them; namely, those indicted of larceny by inquests before sheriffs and bailiffs by their office; those of light suspicion; those taken for petty larceny that amounted not to more than 12d. (b), if they were not guilty of some other larceny before; those guilty of receipt of felons, or of commandment, or force, or of aid in felony done; those guilty of some trespass for which a man ought not to lose his life or limb; a man appealed by a provor, after the death of the provor, if he be no common thief, nor defamed.

If the sheriff, or any other person who had the keeping of prisons, let a person to bail who was not replevisable, he was to lose his office for ever, though he held it in fee; and

(a) Ch. 15. Vid. ant. 15.

(b) The distinction between greater and smaller thefts is mentioned only obscurely by Bracton. This is the first passage where the limit of petty larceny is distinctly marked. Vid. ant. 24.

should it be any inferior officer who had done so without the will of his lord, he was to suffer three years imprisonment, and to be fined at the king's pleasure. Again, if any detained a prisoner, who was replevisable, after he had offered sufficient surety, he was to suffer a grievous amercement to the king; but if he took any reward for delivering such a prisoner, he was to pay double the sum to him, and be at the king's mercy.

In this manner was the law of bail in criminal cases settled in the reign of Edward the First: the same statute has been adopted in later times, as (a) the rule by which justices of the peace are to govern themselves.

Having spoken of such laws as were made to bring offenders to justice, it follows, that we should treat of such as directed the manner of administering it. It had been the usage (contrary to the general law) in some counties to outlaw persons appealed (b) of command, force, aid, or receipt, before the person who was appealed of the principal fact was outlawed. To render the law uniform in this point, it was ordained (c), that none should be appealed of command, force, aid, or receipt, until the person appealed of the fact was attainted; nevertheless, the appellant was not therefore to delay commencing his appeal at the next county against the accessory, any more than against the principal; only the exigent against him was to remain till the principal was attainted of the fact by outlawry, or otherwise. This statute, though it speaks of appeals only, has been construed to extend to indictments.

This account of the alterations made in our criminal law shall be closed with the two following statutes; one relating to the exemption claimed by the clergy; the other concerning a very singular part of our penal code called *peine forte et dure*.

(a) By stat. 1 & 2 Ph. & M. & 2 & 3 Ph. & M.

(b) Vid. ant. vol. I. 315.

(c) Ch. 14.

Of clergy. We have seen that the clergy had so far established the exemption of their persons from corporal pains, as for it to be laid down for law in the last reign, that a clerk taken for the death of a man, or any other crime, and imprisoned, if demanded by the ordinary to be delivered over to the court Christian, should be immediately delivered without any inquisition being taken (a). The pretence of the ecclesiastical court was, that the clerk, so delivered, should be put to make canonical (b) purgation, and to establish his innocence, or stand convicted of the charge. Whether this was constantly or fairly practised, seemed to be a matter of some doubt.

We shall now hear what was ordained by parliament on this point. It was provided (c), that when a clerk was *taken on a charge of felony* (d), and was demanded by the ordinary, he should be delivered to him, according to the privilege of holy church, on such peril as usually belonged to it (by which probably purgation is meant), after the custom used in former times; and the king now admonished and enjoined the prelates, upon the faith they owed him, and for the common profit and peace of the realm, that those who had been indicted of such offences by a solemn inquest of good and lawful men in the king's court, *should in no manner be delivered without due purgation*, so that the king might have no need to provide any otherwise in this matter.

Peine forte et dure.

We now come to the statute which makes the first mention of any thing like, what has since been called, the *peine forte et dure*; a punishment to be inflicted on such as refused to put themselves on a jury, to be tried for the felony of which they were indicted. The

(a) Vid. ant. 14.

(b) Canonical purgation was that by compurgators, and had been recommended by the canons in lieu of that by ordeal, which, in the canon law, was called vulgar purgation.

(c) Ch. 2.

(d) *Est pris pur ret de felonie.*

statute ordains (a), "that notorious felons, and who are
 "openly of evil name, and will not put themselves on in-
 "quests of felonies, with which they may be charged be-
 "fore the justices at the king's suit, *soient mys en la prisonne*
 "*forte et dure*, shall have strong and hard imprisonment,
 "*come ceux qui refusent etre a la commune ley de la terre*,
 "as those who refuse to stand to the common law of the
 "land. But this is not to be understood of such prisoners
 "as are taken upon light suspicion." Great difference of
 opinion has arisen upon this provision. Some have
 thought, that the punishment of *peine forte et dure*, was
 ordained first by this act; and that at the common law, a
 felon standing mute should, upon a *nihil dicit*, be hanged,
 as the law is, at this day, in case of treason. Others have
 holden, that at the common law, in favour of life, he should
 neither have *peine forte et dure*, nor have judgment to be
 hanged, but be remanded to prison until he would answer.
 Lord Coke is of opinion, that the *peine forte et dure* was
 a penalty at common law, and not such a one as any judges
 could have framed upon the general direction of this act,
 which only says, they are to be sent to *prisonne forte et dure*;
 and that the words of this act were designed to refer to a
 subsisting species of penance, which they sufficiently in-
 timated, though the particular mode of it was not de-
 scribed (b).

This provision is worthy of serious consideration. The
 statute says, that *those who will not put themselves on inquest*
of felonies (c), shall be treated *as those who refuse to stand*
to the common law of the land (d). The difference between
 these two kinds of refusal, is a difficulty that stands as much
 in need of explanation as the manner in which the latter
 were punished.

Though this statute, from the form of its expression,
 does not seem to have introduced this penance, but rather

(a) Ch. 12. (b) 2 Inst. 178, 179. (c) *Nese voilent mettre en enqueste des felonies.*

(d) *Come ceux qui refusent etre a la commune ley de la terre.*

speaks of it as a thing already known; yet it does not appear, that it is taken notice of in any ancient writer, record, or case, before the reign of this king. On the contrary, some instances are to be found in the preceding reign of persons arraigned for felony standing mute, who were, nevertheless, not put to their penance, but had judgment to be hanged. The practice in 5 Hen. III. was, it should seem, of the following kind: If a prisoner stood wilfully mute, a jury of twelve men was impannelled. If they found him guilty, another jury of twenty-four was chosen to examine the verdict of the former; and if they were of the same opinion, the sentence was for the prisoner to be hanged (*a*). It is true, there is no mention of such proceeding in Bracton; nor does that author, at all, acquaint us with the method of treating persons who obstinately refused to submit to a fair trial (*b*).

It should seem, then, that this method of treating felons who stood mute, was introduced some time between the 5 Hen. III. (or even the time of Bracton) and the 3 Ed. I. and was not established by this act. That it was supported by some other sanction than this act, is plain from the constant practice, which has allowed this penance to hold in cases of appeal, though the act only speaks of the king's suit; and those authors who wrote nearest the time of which we are now speaking, such as Fleta, Britton, and The Mirror, mention the penance without referring to this statute.

The manner in which this penance is described by Britton is as follows: "If they will not put themselves upon the country, let them be put to their penance (*c*) until they pray to do it; and let their penance be this: that they be barefooted, ungirded, and bareheaded, in their coat only (*d*), in prison upon the bare ground, continually,

(*a*) This appears by two curious records in the notes upon Hale's P. C. vol. II. 322.

(*b*) Vid. ant. 26, 27. (*c*) *Si soient mys a leur penance.* (*d*) *En pure leur cote.*

“ night and day; that they eat only bread made of barley
 “ and bran; that they drink not the day they eat, nor eat
 “ the day they drink; nor drink any thing but water the
 “ day they do not eat; and that they be fastened down
 “ with irons (a).” In Fleta it is stated in a similar way:
*Morti tamen non condemnabitur, sed gaolæ committetur
 sub diætâ salvo custodiendus, donec instructus petat inde
 se legitimè acquietare; consideratio verò erit talis, quòd
 unico indumento indutus, et discalceatus, in nudâ terrâ,
 quadrantalem panem hordeaceum tantùm pro duobus diebus
 habeat ad victum, non tamen quòd quolibet die comedat, sed
 altero tantùm; nec quòd singulis diebus bibat, sed die quo
 non comederit, aquam bibat tantùm, et hæc diæta omnibus
 LEGEM REFUTANTIBUS injungatur donec petant quod
 prius contempserint (b).*

The penance, stated by these two authors, is a rigorous method of compelling the criminal to undergo a trial; yet very different from the cruel way in which felons standing mute were treated in after-times. The alterations this penance received, and the causes that led to such alterations, will be considered in their proper place.

If a conjecture may be hazarded upon a point that has created much debate, perhaps this statute may be considered as auxiliary towards the establishment of trials by jury, in preference to all others then in use. It may be remembered, that *Magna Charta* (c), in declaring the privilege every man shall have of being fairly tried, mentions two modes; that *per judicium parium suorum*, and that *per legem terræ*; there being methods of trial much more ancient, as we have before seen, than that by jury (d); and such as therefore might more properly be called the *lex terræ*, than the later invention of trial *per pares*. It is remarkable that Fleta uses the like expression in this sense.

(a) Britt. c. 4. fol. 11.

(b) Flet. lib. I. c. 29. sect. 33.

(c) Viz. c. 29. Vid. ant. vol. I. 249.

(d) Vid. ant. vol. I. 376, 248, 198, 195.

After reciting at length the judgment of penance; he adds, this is the course *omnibus LEGEM refutantibus*, with all those who refuse to be at the law, or common law; and the particular case he there states as an instance in which that judgment should be passed, is of a criminal, who having said that he would defend himself *per corpus vel per patriam*, as the court should award, would not, as he ought by law to do, make a specific declaration *by which* of those modes he would be tried. This was therefore to be considered as putting himself upon *no trial at all*, which was totally renouncing the decision of the law; and consequently, by the old course recognised in this statute, he was to be sentenced to the penance.

To apply this to the statute before us. The trial by inquest had of late been encouraged, as we have seen in the last reign, and was in more esteem than the barbarous practice of the old jurisprudence; nor was there any object of judicial improvement that more deserved the countenance of a wise legislator than this mode of inquiry. We have seen that Bracton, in his account of the proceeding *per famam patriæ* (a), says, that a person so indicted might make his purgation, *or* put himself upon the country. It does not appear from that passage, nor from any other part of that author, whether *the country* there meant, was the same which had indicted him, or some other: though it should rather seem, from the whole of his discourse on this subject, that a person indicted was to stand or fall by the verdict of that single jury, unless he made his purgation. However, it should seem, that it was intended by the present statute to make an alteration in this point; and that as a person appealed might put himself upon the country to prove his innocence, so one indicted should no longer make purgation, but should be *compelled* to put

(a) Vid. ant. 33.

himself on an inquest of the country, to try the truth of the charge brought against him by the indictors.

If the statute is read with these sentiments, and a knowledge of these circumstances of the then state of criminal judicature, it will receive a new light, and appear in a point of view in which it never was before seen. It will then very plainly ordain, that persons charged or indicted of crimes who will not put themselves on *inquests* (that is, on the particular mode of trial which it is seen fit to encourage, as the more rational), shall be sent to prison, and treated with the same severity as those who refuse to put themselves on the old method of inquiry, long used by the law of the land. The statute certainly reads as intelligibly in this way as in any other, and perhaps more so; and whether this sense of it is not strengthened by the ensuing history of the trial by jury, will be for the reader to judge. One of the most remarkable changes in that proceeding, during this reign, was the invariable resort to a jury to try the indictment, and *deliver* the prisoner of the charge thereby brought against him.

Before we dismiss the statute of Westminster the first, the last chapter but one (a) deserves a slight notice, as it discovers the caution observed in every thing that concerned the rights of the crown, both in private instruments and acts of the legislature. "Forasmuch," says that act, "as the king hath ordained all these things to the honour of God and holy church, and for the common-wealth, and for the remedy of such as be grieved;" as he had condescended so far for the national benefit, "he would not that, at any other time, it should turn in prejudice of himself, or his crown; but that such right as appertained to him should be saved in all points." As the reader goes through the statutes of this reign, he will

(a) Ch. 50.

find many reservations of the king's right even more singular and emphatical than this.

The next statute in this reign is 4 Ed. I. st. 1. and is entitled, *Extenta Manerii*; being a sort of direction for making a survey, or terrier, of a manor and all its appendages. This is followed by the stat. *de coroners. Officio Coronatoris*, enumerating the duties of that office more particularly than they had been stated even by Bracton(a). It is directed by this statute, that the coroner should go, upon the information of bailiffs, or other honest men of the country, to the places where any were killed, or suddenly dead, or wounded; where houses were broken, or where treasure was found; and should forthwith command four, five, or six assessors of the next towns to appear before him in such a place; and there he was to inquire, upon their oaths, whether they knew where the person was killed, whether in a house, bed, tavern, or in company, and who that company were. He was to inquire who were the principals and accessories; who were present, whether men or women, and of what age. Those that were found guilty by the inquisition in this manner, were to be taken and delivered to the sheriff, and committed to gaol; and those who were discovered, but were not found guilty, were to be attached; that is, were to give pledges to appear at the next coming of the justices, and their names were to be written in rolls. The coroner was to go immediately to the house of the person found guilty of the murder, and inquire what goods he had, and what corn in his granary; and, if he was a freeman, what land he had, and the value of it yearly; and was to cause the land, corn, and goods to be valued, as if for sale, and to be delivered to the township, which was to be answerable for them before the justices; the land was to remain

(a) Vid. ant. 12.

in the king's hands, till the lords of the fee had made fine for it. After all this ceremony, the dead body was to be buried, and not before. In like manner inquiry was to be made, when any one was drowned, or suddenly dead, whether any hurt was visible on the body or not; and should it appear they were not killed, yet the coroner was to attach the finders, and all those in the same company.

Besides this inquiry *super visum corporis*, there were other articles, which fell under the jurisdiction of the coroner. He was to enquire of *treasure trove*; who was the finder, or suspected thereof; and he was to attach him by four, six, or more pledges. He was to attach persons appealed of rape, and of wounds, especially if the wounds were mortal; and the party offending was to be safely kept, till it was perfectly known whether the person wounded could recover. If the person recovered, then he need only attach the offender by four or six pledges, according to the size of the wound; if it was for a maim, by not less than four; for a small wound, two would suffice. All these proceedings were to be inrolled in the roll of the coroner. Accessories were to be taken and kept till the principals were attainted or delivered. *Deodands* (a) were to be valued and delivered to the towns, under the direction of the coroners; as was also wreck of the sea, and those that laid hands on it were to be attached: those who did not follow the *hutesium*, or hue and cry, were to be attached. All these objects of police had been, by the old law, entrusted to the coroners; whose office was of great consideration and utility in the preservation of the peace, and the prosecution of offenders.

The statute of *bigamy*, called so from a provision made respecting *bigami* (b), was passed in the same year with the former (c). The general preamble to this short statute (for it contains only six chapters) is very remarkable, and well

(a) Such casualties are called *Bani* in this statute. (b) Ch. 5.

(c) Stat. 4 Ed. I. st. 2.

deserving of notice, as it gives some intimation of the course then pursued in passing laws. It states, that "in the presence of certain reverend fathers bishops of England, and others of the council of the realm of England (a), the underwritten constitutions were recited;" and afterwards they were heard and published before the king and his council (b), who all agreed, as well the justices as others, that they should be put into writing for a perpetual memorial, and that they should be strictly observed (c).

From this recital prefixed to the statute of bigamy, it appears that the statute was digested and framed by a sort of committee of parliament; but that it was the approbation of the king's council, among whom were the justices that determined the king in making it public; and that it was from the concurrence of these two bodies, and not that of the parliament, that it derived its sanction and authority. It was for this reason that *Shard*, in the time of Edward III. (d) was of opinion that this was no act of parliament; however, it has always been received as one. It seems to be a declaration of some points of the common law, which was thenceforward to govern the judges in their decisions.

The first chapter is penned expressly with that view. "It was agreed," says the statute (e), "by the justices and other learned men of our lord the king's council, who heretofore have had the use and practice of judgments," that whereas, in case of a deed and feoffment made by the king, so conceived as that a common person would thereby be bound to warranty, it had been held that the justices could not make an award of recovery over against the king, they had done right in so judging, and the law was so. In the second chapter (f), a like provision was made re-

(a) *De concilio regni Angliæ.* (b) *Coram rege, et concilio suo.*

(c) See Pickering's statutes from the Cott. MS. where the wording differs from that in some editions of the statutes, as may be seen by comparing it with 2 Inst. 287.

(d) 2 Inst. 267.

(e) Ch. 1.

(f) Ch. 2.

specting *Aid prier*; which was the name now given to the course mentioned by Bracton, as a substitute for vouching, where the king was warrantor (*a*). This was to relieve the king from *aid prier*, where there was no express warranty; or in case of a release or confirmation, where the king granted only as much as in him lay; and the like. Another provision was made about *aid prier* of the king by chapter 3. However, as this statute did not get into print till the latter part of the reign of Henry VIII. and, as it should seem, was not commonly known before, *aid prier* had often been granted in opposition to the directions here laid down.

By the fourth chapter (*b*) it was agreed, that a regulation, which, it seems, had been made in the reign of Henry III. about purprestures and encroachments on the king, and which has not come down to us, should be observed. This ordained, that the king should have power to resume into his own hands all such encroachments, whether of franchises or other things.

Then follows the provision which gave the name to this statute (*c*) concerning men twice married, who were called in the canon law *bigami*. These, by a late canonical Constitution (*d*), had been excluded from all the privileges of clerks. However, certain bishops, still grudging that the lay tribunal should gain the advantage which was lost by any individuals of the clergy, had claimed many clerks indicted of felony, notwithstanding they had become *bigami*; alleging that they had married a second time before the Constitution, and therefore, as they said, were not within the meaning of it. As this was an opinion that seemed to have some legal reasoning in its favour, it was necessary to declare by this statute, that neither those who were *bigami* before the Constitution, nor those who had become so since,

(*a*) Vid. ant. vol. I. 439.

(*b*) Ch. 4.

(*c*) Ch. 5.

(*d*) This is a constitution of Gregory X. in the general council of Lyons; and is to be found in the *Sextus Decret.* lib. 1. tit. 12.

should be delivered to the ordinary; but that justice should be executed upon them, as upon lay persons.

The remainder of this act relates to the force and effect of certain words in a deed. It says (*a*), that deeds which contained the words *dedi et concessi tale tenementum*, without reserving homage, or without a clause containing warranty, and to be holden of the donors and their heirs by a certain service, should be so construed as that the donors and their heirs should be bound to warranty. This seems to be only a confirmation of the common law, as laid down by Bracton (*b*). Where a deed contained the words *dedi et concessi*, &c. to be holden of the chief lords of the fee, or of any other, and not of the feoffor, or his heirs, reserving no service, without homage, or without the above-mentioned clause, it was declared, that the heirs should not be bound to warranty, notwithstanding the feoffor, during his life, should be bound by force of his own gift.

The next which presents itself is the statute of Gloucester, 6 Ed. I. containing fifteen chapters. We shall divide the provisions of this as we did those of the former statutes according to their matter; that is, into such as regard tenures and property, and those that relate to the administration of justice, whether civil or criminal.

The remedy a lord had against his tenant for default in service, was by seizing what was on the freehold as a *namium*, and holding it till the arrears were paid: another course was now directed in such situations as were thought likely to produce a defect in service. It was ordained, that where a man lett his land in fee farm, or to find estovers, in meat or in clothing, amounting to the fourth part of the real value of the land, and the tenant suffered the land to lie fresh for the space of two or three years, so that no distress could be found thereon, whereby to compel a render of the ferm or rent, or a performance of what was con-

(*a*) Ch. 6.

(*b*) Vid. ant. vol. I. 445.

tained in the deed of lease; then the lessor, after the end of two years, might have an action to demand the land in demesne, by a writ to be had in the chancery. If the tenant came before judgment, and paid the arrears and damages, and found such surety as the court approved for payment of the future demands, he was to retain the land; but if he delayed till after judgment, he was to be barred for ever (a). The writ framed upon this statute was called a *Cessavit per biennium*, and was considered in the nature of a writ of right. The putting the lord in possession of his tenant's land by this writ, seemed to be a recurring back to the ancient remedy of seizing the freehold (b); under the guard, however, of a formal legal proceeding.

Much has been said on the great force of a Warranty of tenant *per legem Angliæ*. one of which was, that as it bound the heir to protect the donee in possession of the land, so it, *à fortiori*, barred him from ever claiming it against the deed of his ancestor. This point of law was not always consonant to reason and equity. Thus, in case of an alienation with warranty, by a person holding *per legem Angliæ*, that warranty, descending upon the heir, barred him from claiming the inheritance of his mother by action; but, considering the inheritance did not belong to the father, this was an apparent injustice to the heir; and therefore the following statute was made to regulate it. It was ordained, that if no inheritance descended to the heir from his father, the father's warranty, though for him and his heirs, should not bind the heir, nor be a bar to his demanding and recovering the land by writ of mortdauncestor, of the seisin of his mother: but if any inheritance did descend to him *ex parte patris*, he should be barred as far as the value of the inheritance which descended; and if any descended to him afterwards through his father, then the alienee should recover

(a) Ch. 4. (b) Vid. ant. vol. I. 128.

against him of the seisin of his mother, by a judicial writ, to issue out of the rolls of the justices before whom the plea was, to re-summon the warranty; as was done in other cases where the warrantor came into court, and said that nothing descended to him from the person upon whose deed he was vouched. As the son was to recover by mortaucestor, so his issue might have a writ of *cosinage*, of *aiel*, and *besaiel*. In like manner, the heir of the wife was not to be barred of his action after his father's and mother's death, by any deed of his father, if he demanded his mother's inheritance by a writ of entry *sur cui in vitâ*, unless a fine had been levied thereof in the king's court (a).

This provision seems conceived upon an idea that had long prevailed respecting warranty; for, at common law, the heir was not bound to make recompence, unless *sufficient* to enable him so to do had descended to him from the warrantor; and he was bound *ad excambium* only *pro rata*, as far as the *assets* (as they were afterwards called) would go (b). In like manner, after this statute the heir of a tenant *per legem* was not to be barred, unless an equivalent descended to him from his father, who made the warranty. This was going a step further than the common law had gone: for, though an heir was not bound *ad excambium* beyond the assets which descended, it does not appear but that he was bound to warrant, and, of course, barred from claiming the land against the warranty of his ancestor, notwithstanding no assets at all came to him by the same descent.

If the interest of the heir was protected against an unjust alienation of the mother's estate by the father, it deserved no less security against the alienation of the father's inheritance by the mother: not that a gift or feoffment by the tenant in dower could not be avoided by the entry of the reversioner, for the forfeiture; but that the mischief

(a) Ch. 3. (b) Vid. ant. vol. I. 447.

was often carried out of the reach of the law, in this way. Thus, if the feoffee or any other died seised, the entry of him in reversion was taken away; and he could have no writ of entry, as the law now stood, until the death of the tenant in dower; at which time the warranty contained in her deed (as most deeds had a clause of warranty, especially when it was with a direct design to bar the heir) would descend upon the reversioner, if he was her heir, as he generally was, and so bar him of the inheritance for ever (a). To remedy this, it was ordained, that, in such case, the heir, or other, to whom the land ought to revert after the woman's death, should have present recovery; that is, should have right, in her life-time, to demand the land by a writ of entry to be made in the chancery (b). The writ framed upon this statute was called a writ of entry *in casu proviso*; and the words of it are general, *et quæ post dimissionem factam ad præfatum, &c.* without expressing any estate, *contra formam statuti de Glocester de communi concilio regni nostri inde PROVISI, reverti debet per formam ejusdem statuti, &c* (c).

The law of damages underwent some change. Damages used to be awarded in assises of novel disseisin against the disseisors only (d); and if they were unable to make amends, the disseisee was without recompence: but it was now ordained, that should the disseisor alien the lands, and not have that whereof damages might be levied, the person into whose hands the tenements came, should be charged with the damages, so that each should answer for the time he held them; likewise that the disseisee should recover damages, in a writ of entry *sur disseisin*, against him who was found tenant after the disseisor. It was further provided, that whereas damages were not recoverable in a writ of mortd'ancestor, except against the chief lord,

(a) 2 Inst. 309. (b) Ch. 7. (c) 2 Inst. 310. (d) Vid. ant. vol. I. 331.

by stat. Marl. (a), damages for the future should be recovered in that writ, as in one of novel disseisin; and also in writs of *cosinage*, *aiel*, and *besaiel*. Further, as damages had been heretofore taxed only to the value of the issues of the land, it was provided, that a demandant in future should recover the costs of his writ purchased, together with the damages, not only in the above instances, but generally in all cases where he was intitled to recover damages; which is the first law obliging the unsuccessful party to pay the costs of suit. It was moreover enacted, that damages should, in all cases, be rendered where the land was recovered against a man, upon his own intrusion, or his own act (b).

^{Waste.} We have before seen what the common law ordained in cases of waste (c), and what provision had been made by stat. 52 Hen. III. cap. 23 (d). and 3 Ed. I. c. 21 (e). It was now provided, that a writ of waste might be had in chancery against one who held *per legem Angliæ*; in which case, it should seem, it did not lie at common law; and, in addition to the former statutes, it was now declared, that it should lie where any one held for term of life, or years, or in dower. Not that the common law had already provided no redress in all such cases of waste; for we have before shewn, upon the authority of Bracton, that a proceeding might be had for waste against a tenant in dower, a tenant for life, and a guardian (f). It ordains, that a person at-

(a) Viz. c. 16. Vid. ant. 63. and vol. I. 366. (b) Ch. 1.

(c) Vid. ant. vol. I. 384. (d) Vid. ant. 73. (e) Vid. ant. 110.

(f) I am aware that lord Coke lays down the law of waste in a different manner. He says, that it was punishable at common law in three persons, that is, in tenant in dower, tenant by courtesy, and the guardian; but not in tenant for life, or for years. However, that writer gives no authority for his opinion, unless the following observation is to be considered as such; namely, that the law which created the former of these estates and interests, provided a remedy itself against waste, but left the owners of land, who created the others, to provide a remedy in their demise. This sounds plausible enough; but this, like many other

tainted of waste should lose the thing wasted, and should moreover make recompence to treble the sum at which the waste was rated. Whereas it was directed by the Great Charter (*a*), that guardians doing waste should lose their custody, it was now declared, that should the remainder of the wardship not be equal to the waste sustained, the guardian should make it up in damages (*b*).

The increase of frivolous suits in the king's superior courts, occasioned probably the following law. It was declared, that sheriffs should continue to hold pleas of trespass in their counties, as before; and further, that none should have writs of trespass before justices, unless they swore by their faith that the goods taken were worth forty shillings at the least (which was the ancient limit to the sheriff's jurisdiction); if it was a beating, the plaintiff was to swear that the complaint was true. Wounds and mayhems were to be prosecuted as formerly; only the defendants therein were now allowed to make their attornies, if the suit was not by appeal; and if they were absent, when attainted, the sheriff was to be commanded to take them, as if they had been present at the judgment. To avoid delays, it was provided, that if plaintiffs in such actions of trespass caused themselves to be essoined after the first appearance, day should be given to the coming of the justices in eyre, and the defendant in the mean time should be in peace. Again, in all actions where there lay the process of attachment and distress, if the defendant essoined himself *de servitio regis*, and did not produce his warrant at the day, he was to give the plaintiff twenty shillings, as damages for his journey,

general conclusions upon partial and slight *data*, seems to have had nothing else to recommend it to any reception among lawyers, but this captivating, though ideal, diversity. Lord Coke pushes this hypothesis so far as to pass over the doubt that had long been entertained, whether waste was actually punishable at common law in tenant by the courtesy; and lays down the law in the above general manner, without any regard to it. Vid. ant. vol. I. 386. and ant. 73. 2 Inst. 299. Reg. 72. Bro. Waste, 88.

(*a*) Ch. 4. Vid. ant. vol. I. 236. and ant. 110.

(*b*) Ch. 5.

unless the justices in their discretion should order more; besides which he was to be amerced (a).

The tediousness of the old process was lessened by other regulations. In writs of *mortauncestor*, *cosinage*, *aiel*, and *besaiel*, after issue joined, the inquest was no longer to be deferred on account of the nonage of the defendant (b). A former statute (c), which took from parceners the *fourcher by essoin*, was extended to a man and wife when co-defendants (d). In conformity with the common law, it was declared, that where there were many heirs, though in different degrees, they might join with him who could bring a *mortauncestor* (e).

The remaining provisions concerning civil matters are confined principally to the city of London, and other cities and boroughs; and in that light, are of less moment than what has just been mentioned. However, two laws in favour of termors, and to prevent waste, though chiefly designed for the city of London, were extended to the whole kingdom. We have before seen, that a term for years was of very inferior consideration in the scale of estates. One circumstance that rendered such an interest peculiarly precarious was, that it was subject to the will of the person having the freehold, who, by a collusive recovery of the land, might entirely destroy the term; for the (f) termor Feigned reco- would not be allowed to falsify the recovery; veries. it being a rule, that none could falsify the recovery of a freehold, but one who had a freehold. To remedy this it was now ordained (g), that if tenements in the

(a) Ch. 8. (b) Ch. 2. (c) 3 Ed. I. c. 43. Vid. ant. 122.

(d) Chap. 10. Vid. ant. vol. I. 410.

(e) Ch. 6. It is laid down by Bracton, that an *assisa* might be joined with a *consanguinitas*, and both be determined upon one writ; as where a sister demanded of the death or seisin of a father, and a son of another sister; in which case the writ would allege, *A. pater B. et avus C. cujus hæredes ipse B. et C. sunt, fuit seisitus in dominico suo ut de fædo, &c.* Bract. 283. b. Vid. ant. vol. I. 363.

(f) We have before an instance, where a collusive term was established by statute against the freeholder, by way of penalty for a fraud. Vid. ant. 62, 63.

(g) Ch. 11.

city of London were leased for years, and he to whom the freehold belonged was impleaded by collusion, and made default after default, or came into court and surrendered the freehold, to make the termor lose his term, and the demandant recovered, so that the termor became intitled to a writ of covenant against his lessor; in such case, the statute directs, that the mayor and bailiffs might try by an inquest, whether the demandant had right, or sued by collusion to defraud the termor. If the former was proved, judgment was to be given in the suit: if the latter, it was ordained, that the termor should continue to enjoy his term, and execution of the judgment should be suspended till the term was expired. This was the course directed, when a suit depended before the mayor of London, in which case the inquiry used to be made by writ in nature of a commission grounded upon this statute. At the close of the act is this clause: "And in like manner shall it be done, " in like case, *before justices*, in an equitable way, if the " termor challenge it before the judgment." This was a general clause, extending the former part of the act to the whole kingdom; and by virtue of this a termor might before judgment pray to be received to defend the right and interest of his term, on the default, or render, or *nient dedire* of the tenant, but not upon faint pleader. The effect of such interference and receipt of the tenant would be (if he proved the collusion), that execution should be suspended during the term, as in the former case; for the act says, *en mesme le manner* (a).

This is the first statute that gave receipt in any case; but the principle upon which a person interested was allowed to interpose in a suit that was likely to affect his interest, is to be found in the old practice at common law. Thus, if a tenant for life, or in dower, was impleaded, and ne-

(a) 2 Inst. 324.

glected to vouch the reversioner in fee, the reversioner might appear unvouched; and enter into the warranty (a).

A law concerning waste was made for the city of London, and, like the former, was, by a clause at the end, extended to the whole kingdom. This ordains, that, *pendente lite* in the city of London, no tenant should have power to commit waste, or estrepement of the land in question; and if he did, that the mayor and bailiffs, at the proper *suit* of the demandant, should cause the land to be safely kept. This was to be observed in other cities and towns, and *every where else* in the realm (b). Upon this act was framed a judicial *writ of estrepement*, which was granted out of the bench where the principal writ was returned, the old writ of estrepement being, like other original writs, suable only out of the chancery. The judicial writ was in effect a prohibition, upon which there might be an attachment, and the parties would come to pleading.

It seems, that in London there was an assise called an assise of *fresh force*. This was not a proceeding by writ, but by bill in the city court; and no damages were recoverable. As it was, on this account, less effectual than an assise of novel disseisin at common law, damages were now given (c). If in a suit in the city of London, a person was vouched in a foreign country, a difficulty arose, which was now removed by a statute, directing, that a *recordari facias* should issue to remove the cause into the bench, and that a *summons ad warrantizandum* should issue out of chancery. After the vouchee had answered in the bench to the warranty, the cause was to be remanded (d). Some little alteration was made in this proceeding by a sort of writ directed to the justices of the bench, which is now, like some other instru-

(a) Vid. ant. vol. I. 446.

(b) Ch. 13.

(c) Ch. 14.

(d) Ch. 12.

ments of the same kind, placed among the statutes as an act of the legislature (a).

There is only one chapter in this statute that relates to criminal matters. By this it was intended to check the frequent issuing of writs *de odio et atia*, and to appoint a course of bringing persons accused to answer for their offences (b). The king commandeth, says the act, that no writ shall be granted out of chancery for the death of a man, to inquire whether the person killed the deceased by misadventure, or *se defendendo*, or in any other manner feloniously; but such person shall be kept in prison till the coming of the justices in eyre, or justices assigned to deliver the gaol, and then shall put himself upon the country, *de bien et de mal*: and if it appears to the country, that he did it *se defendendo*, or by misadventure, then the king, upon the record of the justices, may take him to his grace, if he pleases; that is, upon the record being certified into the court of chancery, which court was *CORAM REGE in cancellaria*, a pardon would issue from the chancellor. It had before been a matter almost of course to grant pardons in homicide *se defendendo*, and by misadventure (c); which merciful usage, therefore, was only confirmed and se-

(a) This is stat. 9 Ed. I. stat. 1. At the close of this statute is a memorandum to the following effect: "That this article was signed under the great seal, and sent to the justices of the bench, after the manner of a writ patent, with a certain writ closed, dated by the king's hand, that they should do and execute all and every thing contained in the article aforesaid, albeit that the same did not accord with the statute of Gloucester in all things."—A similar instrument follows also the statute of Gloucester, beginning thus: "After, by the king and his justices, certain expositions were made upon some of the articles above-mentioned." Of a similar nature with these two acts was the statute of bigamy just mentioned. Such facts as these, at a period when law and legislature were more regarded than they had been a century ago, are very remarkable examples to confirm the observation before made respecting the king's authority to frame such legislative acts as were calculated to promote a better administration of justice. Vid. ant. vol. I. 216, 217.

(b) 2 Inst. 315.

(c) Vid. ant. 21, 22.

cured to the subject by this statute. The act goes on to remedy the obstruction occasioned to justice by the frivolous objections, to which the proceeding in appeals was liable. It says, that appeals shall not be abated so easily as they have been; but if the appellor declare the fact, the year, the day, and hour, the time of the king, the town, and the weapon, the appeal shall be good and valid, and shall not be abated for want of fresh suit, provided the party sue within a year and day after the fact (*a*): so that the old learning about *fresh suit* became henceforward obsolete (*b*).

Statute of mortmain. In the next year was passed the famous statute, 7 Ed. I. of mortmain, or *de religiosis*, as it is sometimes called. The object of this law was to aid in enforcing the provision of the Great Charter on the subject of alienation to religious societies, and to carry that restriction somewhat further (*c*). Notwithstanding the above law, religious men continued to accept gifts, and to appropriate lands, whereby services that were due for such lands, and that were originally designed for defence of the realm, were withdrawn, and, what was an object of more anxious concern to great lords, the valuable casualties of tenure were gradually diminished. To prevent this, it was ordained, in the most comprehensive and full expressions that could be contrived, that no person whatsoever, religious or other, should presume to buy or sell, or under colour of any gift, term, or other title whatsoever, receive from any one, or in any other way, *arte vel ingenio*, appropriate to himself any lands or tenements, so as such lands or tenements should come into mortmain (*d*), under pain of forfeiting the same: and if any offended against this act, it was made lawful for the chief lord next immediate, within a year, to enter on the land, and retain it in fee and inheritance. If he neglected during that year, the next superior lord might enter; and

(*a*) Ch. 9.

(*b*) Vid. ant. 18, 27.

(*c*) Vid. ant. vol. I. 240.

(*d*) *In mortuam manum.*

if *he* did not enter within half a year, the right of entry was to accrue to the next superior lord; and if all the lords, being of full age, within the four seas, and out of prison, neglected to avail themselves of the forfeiture, the king might take the lands into his hands and infeoff others, saving to the chief lords of the fees their wards, escheats, and other services.

Notwithstanding the solicitude with which this statute seems to have been penned, a method of evasion was soon discovered by ecclesiastics. This was to recover lands by default, in a collusive suit brought against the person who had in contemplation to bestow lands in mortmain. Although this proceeding was by consent and fraud, yet the justices held, that the religious and ecclesiastical persons did not appropriate such lands *per titulum doni, vel alterius alienationis*, as the statute of mortmain expresses it, nor that they were within the words, *aut alio quovismodo, arte vel ingenio*. For as recoveries were prosecuted in a course of law, they were by law presumed to be just and lawful; and it was accordingly held by the justices, that they were not within the statute. These fraudulent recoveries were practised very soon after the statute was made, and in a few years grew to such a height as to occasion a parliamentary interference. It was ordained in 13 Ed. I.(a) that when a default was supposed to be made for this purpose, it should be inquired by the country, whether the demandant had any right to the land or not; and that, if it was found he had, judgment should be for him to recover seisin; if not, the forfeiture should accrue in the manner directed by the statute of mortmain. Every one of the chief lords was to be admitted to challenge the jurors of this inquest, and a challenge might be made for the king. The sheriff was to be charged at the exchequer to answer for the lands in question. After this act it was

(a) Westm. 2. ch. 32.

usual, when land was lost by default, to award a writ, called a *quale jus*, grounded upon this act, in which there was a recital of the recovery; and the sheriff was commanded to summon a jury to try *quale jus idem abbas habuit, &c* (a). Thus were the clergy hunted out of a new device for enriching themselves; but the practice of conveying land by means of a feigned recovery, in a real action, did not cease with this statute: we shall find, in a subsequent part of this History, that this became a common mode of conveyance, of equal authority with the ancient ones by feoffment and fine.

There are other statutes on the subject of ecclesiastical possessions, which, though properly belonging, in point of time, to the latter part of this reign, will, if transposed to this place, more satisfactorily illustrate this important part of the history of landed property.

In stat. Westm. 2d (b). a regulation was made for preserving to religious societies the property they had already obtained. If, says the act, abbots, priors, keepers of hospitals, and other religious houses founded by the king or his progenitors, alien lands given to their houses by him or his progenitors, the land shall be taken into the king's hands to be holden at his will, and the purchaser lose both the lands and the purchase-money: and if the house were founded by any common person, the heir of the donor shall have the following writ, called since a *contra formam collationis*. *Præcipe tali abbati, quòd justè, &c. reddat A. B. tale tenementum quod eidem domui collatum fuit in liberam eleemosynam per prædictum B (c); et quod ad prædictum B. reverti debet per alienationem quam prædictus abbas fecit de prædicto tenemento, CONTRA FORMAM COLLATIONIS prædictæ, ut dicit.* So also of lands given for maintenance of a chantry, or of a light in a church, or chapel, or other alms, if the land given was aliened. If land given for these latter purposes was not aliened, but the alms were

(a) 2 Inst. 429.

(b) Vid. Ch. 41.

(c) Or, per antecessores prædicti B.

withdrawn for the space of two years, the donor or his heirs were to have an action, to demand the land in demesne, as directed by the statute of Gloucester, by a writ of *cessavit per biennium* (a).

The following may be noticed as an instance of the claims advanced by the clergy. Persons who were tenants to the orders of Knights Templars and Hospitaller, enjoyed at this time great privileges, as well against the king as against other lords; as, to be free from tenths and fifteenths due to the king; to be discharged of purveyance; not to be sued for ecclesiastical causes before the ordinary, *sed coram conservatoribus privilegiorum suorum*. Because the knights of both these orders were *cruce signati*, a cross, as the ensign of their profession, used to be erected on their lands, to notify that they were privileged and exempt; and so sacred were such places held, that, at one time, a felon could enjoy sanctuary by flying to these crosses. To abolish these privileges, it was enacted by stat. West. 2d. 13 Ed. I. ch. 33. that wherever such crosses were erected, the land should be forfeited, as land aliened in mortmain. In the stat. *quia emptores*, 18 Ed. I. stat. 1. ch. 3. it was expressly declared, that the licence to alien there given, should not be construed as giving any power to alien in mortmain.

Another provision was made to check the abuse of clerical possessions; one of which was the waste they suffered by being drained into foreign countries. This was by a statute passed at the latter end of this reign, *de asportatis religiosorum*, 35 Ed. I. st. 1. It is therein complained, that abbots, priors, and governors of religious houses, and certain aliens, their superiors, used to set tallages and impositions upon monasteries, and houses in subjection to them, so that much of the opulence which was intended for religious service, the support of the poor,

(a) Vid. ant. 145.

sick, and feeble, and maintenance of hospitality, was conveyed out of the kingdom. To prevent these abuses of religious institutions, it was ordained, that no abbot, prior, warden, master, or other religious person whatsoever, should secretly or openly, by any device, carry or send, or cause to be carried or sent, any such tax out of the kingdom, under pain of being grievously punished for such contempt of the king's solemn injunctions to the contrary (*a*); and all alien abbots, priors, masters, wardens, and the like, imposing such tax, were to forfeit for the offence every thing they had (*b*). The provisions of this statute were in aftertimes reviewed by the legislature, when it was employed in devising some method to restrain a new contrivance for enriching foreigners with ecclesiastical property, called *provision*. The persons practising this new device were called *provisors*, and were made subject to many penalties and forfeitures.

Statute of
Acton Burnel. To return to the order of statutes, from which we have been digressing: the next is the statute of *Acton Burnel de Mercatoribus*, 11 Ed. I. The pressing demands of mercantile concerns made merchants complain of the delays and niceties of the law, and request some speedy course might be appointed for recovering payment of their debts at the appointed days; the want of which, it is said, occasioned many merchants to withdraw from the kingdom. The shortening of the process of attachment in favour of merchants, as was usual in the last reign (*c*), was a partial redress, and since the *solennitas attachiamentorum* had been corrected by several statutes, they seem to have enjoyed no distinction in point of process from common plaintiffs. For the support therefore of credit, and the welfare of commerce, the following method of securing a ready payment of the debts of merchants was ordained by parliament. A merchant

(*a*) Ch. 2.

(*b*) Ch. 3.

(*c*) Vid. ant. vol. I. 487.

who wished to be sure of his debt, was to bring his debtor before the mayor of London, York, or Bristol, as it might be, or before the mayor and a clerk, to be appointed by the king, there to acknowledge the debt, and day of payment; and the recognizance was to be entered on a roll by the clerk. Besides this, the clerk was to make a writing obligatory, to which the seal of the debtor, together with the king's seal (which was to be provided for that purpose and to be kept by the mayor), was to be affixed. If the debtor did not keep his day of payment, the creditor was to apply to the mayor; and upon view of the writing obligatory, and recognizance, the mayor was immediately to cause the chattels and devisable burgages of the debtor to be sold, to the amount of the debt, by the appraisement of honest men; and the money was immediately to be paid to the creditor: if no buyer could be found, the goods themselves were to be delivered to him. As to the sale of the devisable burgages, the king's seal was to be affixed thereto, for a proof of the sale. If the debtor had no moveables within the mayor's jurisdiction, the mayor was to send the recognizance to the chancellor, who was to direct a writ to the sheriff of the county where the goods were, to act as the mayor.

If the appraisors, out of favour to the debtor, set too high a price upon the goods, they were themselves to take them at the price, and be answerable to the creditor for the debt; but the debtor had no redress if they were sold under their value; it being his own folly, says the statute, that he did not sell them himself, and pay his debt with the produce. If the debtor had no moveables, then his body was to be taken, and kept in prison till he or his friends had made agreement with the creditor; and, should he be so poor as not to be able to support himself in gaol, the creditor was to sustain him with bread and water; which expence, as well as the debt, was to be defrayed by the debtor before he could be released. If the creditor

was a merchant stranger, the debtor was likewise to pay all expences attending his extraordinary stay here. If, instead of taking the body, the creditor would accept sureties, or mainpernors, for the payment, they were to bind themselves before the mayor, in like manner as the original debtor, and were to be subject to the same execution; though that was not to be, till the goods of the principal were first exhausted.

Complaint, it seems, was made to the king, that this statute had been misinterpreted by sheriffs, and the execution of it delayed, upon various pretences. The king therefore, in a parliament holden the 13th year of his reign, caused the statute of Acton Burnel to be rehearsed, and then several declarations were made by the legislature for enforcing it: these are contained in the *Statute of Merchants*, 13 Ed. I. st. 3. By this act, the recognizance may be taken before the mayor of London, or before some chief warden of a city, or of any other good town where the king shall appoint, or before the mayor and chief warden, or other sufficient men chosen and sworn thereto, when the mayor and chief warden cannot attend; and before one of the clerks to be appointed by the king. The recognizance is to have two parts; one to remain with the mayor or chief warden, the other with the clerks. The seal of the writing obligatory also is to be of two parts; the greater of which is to remain with the mayor or chief warden, the other with the clerk. Instead of the prefatory process against his moveables, by this act the body of the debtor, if he is a layman, is to be taken in the first instance, and committed to prison till he has agreed about payment of the debt; and if the keeper of the prison do not receive him, he is to be answerable for the debt: a like power is given to the chancellor, if the debtor is not within the jurisdiction of the mayor. Within a quarter of a year after he is taken, his chattels and land (without confining it to burgages devisable, as the last act did) are to be de-

livered to him, that he may pay his debts by selling them; and such sale of his lands and tenements during the quarter of a year, for the discharge of his debts, was declared good and effectual. If he did not make agreement about payment within the second quarter of a year, all his goods and lands are to be delivered to the creditor by a reasonable extent, *to hold them until such time as the debt is wholly levied*; and the debtor is still to continue in prison, and be kept on bread and water by the merchant. The merchant is to have such seisin in the lands and tenements delivered to him or his assignee, as to be intitled to maintain a writ of novel disseisin, and re-disseisin, as if it was a gift of a freehold to him and his assigns, till the debt is paid. When the debt is paid, the land is to be restored, and the debtor delivered from prison. The statute directs, that writs issued by the chancellor for taking the debtor, should command the sheriff to certify the justices of one bench or the other what had been done therein, at a certain day; at which day the merchant is to appear, and there sue, if agreement is not made. If the sheriff returned *non inventus*, or that he was a clerk, then they proceeded against the goods and land, as before-mentioned. The creditor is to be allowed all damages, costs, and expences. If there are sureties, they are to be proceeded against, as the principal debtor is.

It is ordained by the statute, that all lands that were in the hands of the debtor at the time of acknowledging the recognizance, even if given away since by feoffment, are to be delivered to the merchant; and after the debt paid, they are to return to the feoffee. Further, it was added by way of caution, that should the debtor or his sureties die, the merchant shall not take the body of his heir, but shall have his lands, in like manner as if the debtor was living. All persons might enter into recognizances under this act; except only Jews, to whom this statute was not to extend. There was a saving of the old

method of acknowledging recognizances, which was to be practised as before. The writ to take the person recited the acknowledgment of the recognizance, and then commanded, *quòd corpus prædicti A. si laicus sit, capias, et in prisonâ nostrâ salvo custodiri facias, quousque de prædicto debito satisfecerit.*

This last statute may be considered as contributing to extend the power of alienating land. In the same sessions, as we shall see presently, any common creditor by judgment, was empowered to take half the debtor's land in execution; but we see that, in favour of trade, a merchant who had resorted to this security might have the whole. A recognizance acknowledged with the formalities here prescribed, was in after-times called a *statute merchant*; and a person who held lands in execution for payment of his debt, as hereby directed, was called *tenant by statute merchant*.

CHAP. X.

EDWARD I.

Origin of Estates-Tail—Regulation of the Eyre—Justices of Nisi Prius—Justices of Gaol-Delivery—Of Replevin—Of Accountants—Waste—Of Execution of Process—Of summoning Jurors—Of Essoins—Writ of Elegit—Bill of Exceptions—Scire Facias—Cui in Vitâ—Quòdei de forceat—Of Presentations to Churches—Admeasurements of Dower and Pasture—Writs in consimili Casû—Ejectment of Ward—Presentments of Jurors to be sealed—Rape—Statute of Winchester—Statute of Circumspectè Agatis.

THE most distinguished period of this king's reign is the thirteenth year, when great alterations were made in the law by several statutes. In this year we have the statute of Westminster the second, the statute of Winchester, the statute of merchants mentioned in the preceding chapter, and the statute of *circumspectè agatis*. Each of these is an important occurrence in the juridical history of this reign.

In discoursing of these statutes, we shall begin with the statute of Westminster the second. The first chapter of this statute is on the subject of some of those conditional estates, of which so much was said in the last reign (a). It is generally known by the name of the statute *de donis conditionalibus*. This act has occasioned more discussion

(a) Vid. ant. vol. I. 294.

than, perhaps, any parliamentary provision in the statute-book; and deserves a very particular consideration in this place. The design of it cannot be better understood,

Origin of
estates tail. than from a recital of its contents. It says, that where lands were given upon condition, as to a man and his wife, and the heirs begotten between them; with an express condition, that, should the man and his wife die without heirs begotten between them, the land should revert to the donor or his heir: again, where land was given *in liberum maritagium* (which sort of gift, we know, had an implied condition, that, upon the death of the husband and wife without any heir begotten between them, the land should revert to the donor or his heirs): again, where land was given to a man *et hæredibus de corpore suo exeuntibus*; it seemed hard, says the statute, to the donor and his heirs, that their will expressed in the gift should not be observed; for, says the act, in all the above cases the feoffees *post prolem suscitam, et exeuntem ab ipsis*, have hitherto had a power to alien the land so given upon condition, and to disinherit their issue, contrary to the will of the donors, and the express form of the gift. And whereas, if such feoffees had no issue, and even if there had been any issue, which had afterwards died, the land ought, by the express form of the gift, to revert to the donor or his heir; yet the persons to whom such conditional gift had been made, used to infeoff others, and so bar the donors of their reversion; all which was in direct violation of the form of the gift.

These are the mischiefs of which the statute complains; and to remove them it ordains as follows: that thenceforward “*the will of the giver(a), according to the form in*

(a) These words are taken from the translation in our statute-book, which I preferred in this particular instance, because every one's ear is familiarized to them; and as this is the principal passage in the statute, I thought that some readers might be startled, and disappointed by a new form of expression. In the other parts of the statute, I have strictly

"*the deed of gift manifestly expressed, shall be observed;*" so that the person to whom such a conditional gift was made, should not have power to alien, and prevent the land from *remaining* to his issue, or, upon failure of issue, to the donor or his heir. It was declared that the second husband of such a woman should not claim any thing *per legem Angliæ*, in such conditional gift; nor the issue of such second husband claim any thing by descent; but that immediately upon the death of a man and woman to whom land was so given, it should *revert* to their issue, or to the donor or his heir; so that the law, in this particular, as laid down both by Glanville and Bracton, was changed; and the opinion maintained by *Stephanus de Segrave* in the last reign was established (a). These are the words of this famous law; the great object of which seems to have been to secure the then possessors of land in the power of making dispositions that were to endure to all eternity. The inclination shewed by the courts to support the principle of this statute, and the construction they put upon it, soon promised to carry this intention into full effect.

adhered to the original; and the language, for that reason, will be found to vary from the common translations. Having in the above instance shewn my regard for the prejudices of the modern lawyer, I must attend to those of the juridical historian, and to the nature of this work. The reader who has passed through the former part of this History arrives at this period full of a prepossession in favour of certain forms of expression. Instead of a *deed of gift*, he would expect to hear of a *charter of donation*, and so indeed it ought to be. That it is absolutely necessary to adhere to the language of the time, in pursuing an inquiry like this, every one must know. A curious observation in the next page upon the construction of this statute, is founded intirely on the expression, and would have been lost, if the common translation had been followed. However, the reader should be apprised, that, from the time of this king, a conflict will inevitably arise between the old and new language of the law, and the victory will in the end be decided in favour of the latter. It must be our business to take care, now we have so much to say on the alterations made in the law by statutes, that this *new* translation of *old* laws does not precipitate the victory before its natural time.

(a) Vid. ant. vol. i. 298.

The construction of the judges upon the wording and intention of this statute was, that the donee should no longer have a *fee conditional*, as before, but that the fee should be *entaillé*, cut, or divided, and he should have a *fædum talliatum*. Indeed, this seems to have been foreseen by the makers of the act; for, in the same parliament, and before the statute could have been agitated in the courts of law, we find the term *fædum talliatum* (a) as expressing an estate then existing in the law. It appears, that very early after the statute the judges had gone a great way in pursuing its intention; for they not only cut a fee tail out of a fee simple, but they again divided the fee tail: as for instance, if a person took land by purchase to him and his wife, and to the issue begotten by them in lawful matrimony, nothing would here accrue to the purchasers but a freehold for their lives, and the *fee* to their issue: if they had no issue, the fee remained in the person of the donor till they had issue; and if the purchaser had no issue, or the issue failed, the land reverted to the donor (b). In this construction they seemed intirely justified by the terms of the statute; for it speaks of the land not as *descending* to the issue, but as *remaining* (c), or *reverting*; and, notwithstanding the term *dēscēdere* in the writ given by the act, it seems to consider the issue and the donor as in the same light. The numberless consequences which followed from the restriction imposed by this statute, furnish no small part of the discussion to which landed property afterwards became subject; as will be seen in the course of this History.

A remedy was ordained by this act for those who would avail themselves of the new regulation made by it. The following form of a writ was given: *Præcipe A. quod justè, &c. reddat B. manerium de F. cum suis pertinentiis, quòd C. dedit tali viro, et tali mulieri, et hæredibus de*

(a) Ch. 46.

(b) Britt. fo. 93.

(c) An estate *ad remanentiam* in Glanville, signifies an estate in fee. Lib. 7. c. 1.

ipso viro et muliere exeuntibus, &c. Or thus: *quod C. dedit tali viro in liberum maritagium cum tali muliere, et quod post mortem prædictorum viri et mulieris, prædicto B. filio eorundem viri et mulieris descendere debeat per formam donationis prædictæ, ut dicit, &c.* Or thus: *quod C. dedit tali et hæredibus de corpore suo exeuntibus, et quod post mortem illius talis, prædicto B. filio prædicti talis descendere debeat per formam, &c.* The writ here given was for the issue, and was in after-times called a *formedon in discender*. There was no writ of *formedon in reverter*, as it has since been called, given by the statute; the writ whereby the donor might recover when issue fails, (says the act) being common enough in the chancery; though there is no mention of such a writ in Bracton. Lest the efficacy allowed by the law to a Fine should prejudice the provisions hereby ordained, it was declared, that if a Fine was levied of lands given in the above form, *ipso jure sit nullus* (a), it should be void; and their heirs, or those to whom the reversion belonged, though they were of full age, within England, and out of prison, should not be under necessity to make their claim (b). This is the whole of the statute *de donis*, to which we shall have frequent occasion to recur in the course of this work.

It has been seen (c) how the administration of intestates' effects came into the hands of the ordinary; who was bound, however, to do such things as the executors would have been liable to, had there been a will. It seems, this part of his charge was not sufficiently considered by the bishop, and therefore the following declaration of the common law was made; namely, that the ordinary should be bound to answer the debts of the intestate, as far as the goods would go, in the same manner as the executors must have done (d).

(a) It may be worth remarking, that these very words are used by Bracton to express, that a fine was void. Vid. ant. vol. I. 479.

(b) Ch. I. Vid. ant. vol. I. 478. (c) Vid. ant. vol. I. 307. 309.

(d) Ch. 19.

Executors could not, by the common law, have an action of account, for an account to be made to the testator, because an account was a matter that was considered as resting in privity between the two parties concerned: for which reason it was ordained, that, for the future, they should have a writ *de compoto*, with the same process as the deceased would have been entitled to (a).

The remainder of this statute consists of improvements in the administration of justice. These were very numerous and important; the change in the order and course of judicature, which was the grand object of Edward's reformation in the law, being principally effected by this statute. These regulations divide themselves into such as concerned the jurisdiction of courts, and such as made any variation in the course of proceeding. We shall first speak of the former, in the order in which they were made.

Regulation of the eyre. The first of these relates to the proceedings at the eyre. There used to be proclamation made for the delivery of all writs by a certain day; after which no writ was to be received. Suitors trusting to this used to depart, when, by some connivance, writs would be received in their absence, and they lost their land by default. To prevent this, it was ordained, that the justices in their eyres should appoint a time of fifteen days, or a month, more or less, according to the size of the county; within which the sheriff was to certify the chief justice of the eyre, how many and what writs he had, and none was to be received after that; but all process issuing upon writs received after that, was to be null and void. However, to this there were made several exceptions: first, that writs abated might, during the whole eyre, be amended: secondly, that writs of dower of the seisin of men who died within the summons of the eyre(b), assises *ultimæ*

(a) Ch. 23.

(b) Lord Coke, 2 Inst. 377, construes *infra summonitionem itineris* to signify the space of forty days previous to the coming of the justices in eyre; but I am inclined to think it means, as in Bracton, the district

præsentationis, writs of *quare impedit*, of churches vacant within the aforesaid summons, should be received at any time before the departure of the justices: and lastly, that all writs of novel disseisin, at what time soever the disseisin was done, should be received in the eyre.

This chapter makes a provision concerning the appointment of attornies. At common law, the king might, by letters patent, or by writ under his seal, grant to any demandant or plaintiff, tenant or defendant, to make his attorney in any action, and command the judges to admit such person to be attorney; but now, by this act, for the quiet and good of his subjects, the king *de speciali gratiâ* granted, that such as had lands in several shires where the eyre was held, and had a suit there, and were apprehensive that they might be sued in some other county, as before the justices of the benches at Westminster, or the justices *ad capiendas assisas*, or in any county before the sheriff, or in a court baron, might make their *general attorney* to prosecute and defend suits for them in the eyre: which attornies were to have authority to do all acts, till they were removed, and the plea determined; though they were not on that account to be excused from being put on juries and assises before the justices (a). By this parliamentary permission to make attornies, the king gave up the fees that used to be paid for a special permission to appoint an attorney; and, in proportion, the carrying on a suit became less expensive and troublesome to the subject than it had been (b).

The next provisions concerning judicature are ch. 29 and 30. The former relates to justices *ad audiendum et terminandum*, or (c) of *oyer* and *terminer*, as they have

within which the summons of the justices itinerant would run. Vid. ant. vol. I. 346.

(a) Ch. 10.

(b) 2 Inst. 378.

(c) It may be remarked, that *Oydor*, from *Oyr* to hear, in Spanish, signifies a judge.

since been usually called. Of these there is no mention in Bracton, though they are hinted at in a statute of the last reign. It was now enacted, that a writ (for so commissions were called) *de transgressione ad audiendum et terminandum*, for hearing and determining any outrage or misdemeanour (for *transgressio* is to be understood in a large sense) should not from thenceforth be granted before any justices, except justices of either bench and justices in eyre, *nisi pro enormi transgressione*, unless in cases of particular enormity, where it was necessary to provide speedy remedy, and the king in his special grace should think fit to grant it; nor was a writ *ad audiendum et terminandum*, to hear appeals, to be granted but in special cases, and for certain causes, at the king's command. But, that such appellees might not be detained in prison an unreasonable time, they were to have their writ *de odio et atia*, as ordained by *Magna Charta* (a). It should seem, from the manner in which the writ of *oyer and terminer* is here spoken of, that it was usually issued at the suit and prayer of some person, and was not a general commission, like that of gaol-delivery: it used also, one should think, to be directed to private persons, whose names were inserted by the direction of the party suing it out. A writ of *oyer and terminer* might be superseded under this statute, *quia non enormis transgressio*, &c.

This is followed by the statute of *nisi prius*, as it has since been called. It will be unnecessary to recapitulate the account formerly given, and so frequently recurred to, of the order of judicature, both as it stood at common law, and as it was altered by *Magna Charta*, and subsequent usage (b). In further reformation thereof, the following

Justices of
nisi prius. regulation was now made. It was ordained, in the first place, that there should be assigned two justices sworn, before whom, and them only, should

(a) Ch. 29. Vid. ant. vol. I. 252.

(b) Vid. ant. vol. I. 245.

be taken all assises of novel disseisin, mortauncestor, and attaints. These justices were to associate to themselves one or two of the discreetest knights of the county into which they came, and to take the before-mentioned assises and attaints, at most, three times in the year; that is, between the *quindena* of St. John the Baptist and the gule of August, that is, the feast of St. Peter *ad vincula*, being the first of August; then between the feast of the exaltation of the holy cross, that is, the fourteenth of September, and the octave of St. Michael; then between the feast of the Epiphany, that is, the sixth of January, and the feast of the Purification of the blessed Mary (a). These justices were, in every county, before their departure, to appoint the day of their return, that every one might know of their next coming: they were to adjourn assises from term to term, if the taking of them was deferred by vouching to warranty, by essoin, or by default of recognitors: and if they saw it would be proper for assises of mortauncestor, when respited by essoin or voucher, to be adjourned into the bench, they were to send the record with the original writ before the justices of the bench; and when the plea had proceeded as far as to the caption of the assise, then the justices of the bench were to remand the record, with the original writ, back to the former justices, before whom the assise should be taken. It was ordained, that the justices of the bench should give four days, at least, in the year, in assises of the above kind, before the said justices assigned, in order to spare expence and trouble.

Thus far the statute provides concerning assises, which was nothing more than a modification of the institution of justices of assise by *Magna Charta*. It then goes on thus: Besides the above, inquisitions to be taken of trespasses which were in suit before the justices of both

(a) For these feasts and seasons, and the relation they bore to the terms, *vid. ant.* 58, the scheme of *dies communes in banco*.

benches (unless it was an enormous trespass that required a more (a) solemn enquiry) were to be determined before these justices; as were also inquisitions arising in other pleas depending in both benches, where the issue was of easy examination; as an entry or seisin, or any one single point which was to be tried. But it ordains, that inquests, where great and numerous points were to be tried, which required much examination, should be taken before the justices of the bench, unless both parties joined in praying that the inquest might be taken before *aliquibus de societate*, some associated in the commission, *cum in partes illas venerint*; which, however, was never to be done in future but by two justices, or one justice, together with a knight of the county, who should be agreed upon by the parties.

To carry the provision of this act into execution, it was moreover ordained, that no inquest should be taken before any of the justices of the bench, unless a certain day and place was appointed in the county, in presence of the parties, and the day and place inserted in a judicial writ, in these words: *Præcipimus tibi, quòd venire facias coram justitiariis nostris apud Westm. in octabis sancti Michaelis, NISI talis et talis tali die et loco ad partes illas venerint, duodecim, &c.* Thus the inquest was to be taken at Westminster only upon failure of its being taken in the county; and the trial in the county was in later times, from the clause in the writ, said to be at *nisi prius*; though in the above *venire* given by the statute, the word *prius* is not inserted, as it now is, and indeed usually was at that time; for this clause of *nisi*, or *nisi prius*, was not a new thing. In the reign of Henry III. when it seemed to be arbitrary and promiscuous whether certain writs should be tried at Westminster or in the eyre, we find some of them had this clause, *NISI justitiiarii PRIUS ad partes illas venerint* (b), &c.

(a) Vid. ant. 170.

(b) Vid. ant. vol. I. 382.

Inquests taken in this manner were to be returned into the bench, where judgment was to be given, and the inquest inrolled; and inquests taken otherwise than in the above way were to be held void, except that assises of *darrein presentment*, and inquests of *quare impedit*, should be determined in their own county, before one justice of the bench and one knight, at a day and place certain appointed in the bench, whether the defendants consented or not; and there the judgment was to be given immediately. It was further directed, that all justices of the benches in their itinera should have clerks to enroll pleas pleaded before them, as they had been used in time past. It was ordained that justices assigned to take assises should not compel jurors to say precisely whether it was disseisin or not, so as they shewed the truth of the fact, and prayed the assistance of the justices; if they, however, of their own accord would say generally, that it was or was not disseisin, their verdict was to be taken at their peril (a). This caution seems to have been in affirmance of the common law, and was inserted only to guard jurors from being driven into the danger of an attain (b).

This was the manner in which the old appointment of justices was reformed, and that of justices of *nisi prius*, as they were called in after-times, was first made. This latter received afterwards several alterations; some of which were made in this reign. As these contribute to shew the history of this important improvement in our judicial polity, it will be proper to mention them now, and bring the whole of this subject into one point of view. It seems, the justices of gaol-delivery, either not Justices of returning so frequently into the country as was gaol-delivery. to be wished, or the persons filling that office not executing it as they ought, it was enacted by stat. 27 Ed. I. stat. 1. c. 3. that justices assigned to take assises in every county,

(a) Ch. 30.

(b) Vid. ant. vol. I. 330, 331. 370, 371, &c.

after the assises so taken, should remain together, if they were laymen; and if one of them was a clerk (which was very often the case), then one of the discreeter knights of the county being associated with him who was a layman, they two by the king's writ should deliver the county-gaol, as well within liberties as without, as had been done in gaol-deliveries formerly; and then proceed to make inquiry of, and punish sheriffs for breaches of the statute 3 Ed. I. c. 15. concerning bail and mainprize. Thus were justices of assise and *nisi prius* constituted also justices of gaol-delivery.

The times for taking inquests, and the persons who were qualified to be justices of *nisi prius*, were altered by the next chapter of this act, in the following way. Inquests and recognitions determinable before justices of either bench, were by this new law to be taken in time of vacation, before any justice of the same bench where the suit depended, to whom was to be associated one knight in the county where the inquest was taken; though in this, as in the former act, there was an exception of inquests that required great examination. This statute further empowered the justices, in taking inquests, to do that which appeared to them most expedient for the good of the realm, *non obstante* the statute of *nisi prius* (a).

Further, by the statute *for persons appealed*, 28 Ed. I. stat. 2. it was ordained, that where such justices assigned to take assises, and deliver gaols, found any provors in the gaol; the sheriff of the county where the persons appealed were resident, should be commanded by the king's writ, upon testimony of such justices, to take the persons appealed, and bring them before the justices, where they should answer. If they would put themselves *super patriam*, the justices were to issue a judicial writ to the sheriff of the county where the felony was committed, *quòd venire*

faciat an inquest of the county, to appear before the justices of the place where the provor was then detained.

Thus stood the jurisdiction of these justices at the end of this reign. This institution was found to be a great improvement on the eyre; and, as it received several alterations in the two following reigns to render it still more beneficial and convenient, it soon made that ancient establishment less necessary, and by degrees wholly superseded it. The variety in the taking of inquests, sometimes *in banco*, and sometimes in the county, as was the practice in the last reign, no longer subsisted (*a*); but the whole was reduced to one uniform system.

While the superior tribunals were thus ascertained, the excesses committed by inferior courts in extending their jurisdiction, were repressed by an act (*b*) which gave treble damages against sheriffs, and other bailiffs or lords, who procured suits to be maliciously brought against persons, without any cause of action, in the county, hundred, and other courts. Among other regulations about inferior jurisdictions, a check was imposed upon the judicial authority assumed by certain persons appointed by the Hospitallers and Templars to be their *conservatores privilegiorum*: these were enjoined not to presume to entertain suits of matters belonging to the king's court (*c*).

Thus far were provisions made for ascertaining the bounds of judicature, and securing a regular access to courts of different kinds. There were many alterations made in the old remedies, which tended to render the former method of proceeding more easy and effectual. Others, wholly of a new kind, were contrived for ordering a course of redress in cases not already provided for: these consisted chiefly in new writs, upon which real actions were founded, applicable to various purposes. We shall first speak of the improvement made in the re-

(*a*) Vid. ant. vol. I. 382. 391. (*b*) Ch. 36. (*c*) Ch. 43. Vid. ant. 157.

medies at common law, and then of those that were entirely new.

Of replevin. The next chapter to that *de donis condition-
alibus*, provides a remedy in three cases of suits *de vetito namio*, which were thought great grievances. When a lord distrained for services, and the tenant replevied either with writ or without, and upon the plaint being made in the county or other inferior court having jurisdiction *de vetito namio*, he avowed the taking to be lawful and just, the tenant might, as we have seen, disclaim any tenure between them; whereupon, as the county could not try the tenure, there was an end of the suit, as far as it could be maintained in that court, and the distrainer would be *in misericordiâ*, and it was not in the power of the court to inflict any penalty on the tenant for disclaiming the tenure (a). This was one defect, which it was intended to remedy by the following provision. It was ordained, that, in future, where lords could not, in the like case, obtain justice against their tenants in the county or other inferior court, they might, as soon as they had been attached, have a writ *ad ponendam loquelam coram justitiariis*, before whom alone justice could be substantially done to such lords; and in the writ of *pone* was to be inserted this clause of removal, *Quia talis distrinxit in fædo suo pro servitiis, et consuetudinibus sibi debitis, &c.* This allowance of a *pone* to the defendant, says the statute, is no prejudice to the rule of the common law, that forbids (b) any suit *poni coram justitiariis* at the motion and prayer of a defendant; for though, at first sight, the tenant seems to be the plaintiff, and the lord defendant, yet, when it is considered that the lord has distrained, and sues for his services and customs in arrear, he appears rather in the light of a plaintiff. As a rule to the justices to know on what seisin a lord should be permitted to avow a distress upon his tenant, it was agreed and enacted, that a distress

(a) Vid. ant. 47.

(b) Vid. ant. vol. I. 402.

should lie of seisin of a man's ancestor or predecessor, & *tempore* that a writ of novel disseisin would run.

A second inconvenience in cases of distress was, that, after replevyng his cattle, the tenant would sell or *eloin* them, as it was called, so as effectually to prevent their being returned to the lord, if the judgment of the court happened to be for a return. To remedy this it was provided, that, in future, the sheriff or his bailiff should, before he made delivery of the cattle, take not only pledges *de prosequendo*, as had been always usual (and indeed the proceeding was thence called *replegiare*), but also pledges *de averiis retornandis*, for the returning the cattle, if a return should be adjudged. If pledges were taken in any other way than this, the person taking them was to answer himself for the value of the cattle; and the lord might have a writ against him, *quòd reddat ei tot averia*, or *tot catalla*: if the bailiff could not make the amends, his principal was to be liable.

A third inconvenience was, that when a return of the cattle was adjudged to the distrainor, the tenant would again replevy them; but when the lord appeared in court, he would make default, and consequently a return of the cattle would again be adjudged to the lord; and so it might happen several times, to the harassing of the lord, and the utter contempt of the king's court. To remedy this, it was ordained, that, after judgment for return of the cattle, the sheriff should be commanded by a judicial writ, *quòd returnum habere faciat de averiis*; and therein should be inserted a clause, commanding him not to deliver them again, without a writ making mention of the judgment passed by the justices (which could not be but by a writ issuing out of the rolls of the justices before whom the plea was depending); and when the tenant applied to the justices in such case for a new replevin of his cattle, it was to be by a judicial writ, commanding the sheriff, *quòd captā securitate de prosequendo, et etiam de averiis* (or *catallis*)

retornandis, vel eorum pretio, si returnum adjudicetur, &c. since called a writ of *second deliverance*. Upon this the sheriff was to make deliverance of the cattle that were returned; and to attach the distrainer to appear on a certain day before the justices, where the plea was to be heard. If the person replevying should make default, or a return should on any other account be adjudged, in this second replevin, the distress was ever after to remain *irreplevisable*; saving, however, a new distress for any new cause (a). The writ of *second deliverance* is similar to one of the same kind used in Bracton's time (b), called a *second caption*; though that was, as it should seem, an original writ. Indeed there is no mention in Bracton of any decisive effect that writ of *second caption* had, more than the writ of replevin; and the making the cattle *irreplevisable* seems intirely a regulation of this statute.

Of account-
ants. The proceeding against accountants was rendered more strict in all cases of servants, bailiffs, chamberlains, and all manner of receivers who were bound *ad compotum reddendum*. It was ordained (c), that when the lord of servants of that kind assigned them *auditores compoti*, auditors of account, and they were found in arrears, their bodies should be arrested, and they should be sent, on testimony of such auditors, and delivered to the next gaol of the king in those parts, there to be kept by the sheriff or gaoler *in ferris, et sub bonâ custodiâ*, at their own expence, till they satisfied all arrears. If a person so delivered to custody should complain that the auditors had charged him with receipts which never came to his hands, and had not allowed him reasonable disbursements, and could find friends who would become *manuaptors* for him, and undertake to bring him before the barons of the exchequer, he was to be delivered to them. Further, the sheriff, who had cus-

(a) Ch. 2.

(b) Vid. ant. 52.

(c) Ch. 11.

tody of him, was to *scire faciat* the lord to appear at a certain day before the barons of the exchequer, with his rolls and tallies by which he made his account; and in the presence of the barons, or auditors whom they should assign, the account was to be rehearsed, and justice done between the parties. If the receiver should be found in arrears, he was to be sent to the Fleet-Prison (*a*). Upon this clause was framed the writ called *ex parte talis*, for the person imprisoned to bring the inquiry before the court of exchequer.

Thus far of a particular method of proceeding with accountants. It was further ordained generally, in like cases of account, that if the accountant fled, and would not come to account, he was, according to the statute of Marlbridge (*b*), to be distrained, if he had any thing whereof distress could be made, *ad veniendum coram justitiariis ad compotum suum reddendum*; and if upon appearing he was found in arrear, and could not pay, he was to be committed to gaol, as before-mentioned. If he fled, and it was certified by the sheriff that he was *non inventus*, he was to be demanded (*c*) from county to county, till he was outlawed. It was moreover declared, that persons imprisoned for such matter should not be replevisable, and the sheriff was enjoined not to permit them to go at large, either upon a writ of *replegiare* or otherwise, without the assent of the lord, on pain of answering to him for the damages he had sustained by such servants, according to the amount he could make out *per patriam*, to be recovered in an action of debt. If the gaoler could not make amends himself, his principal was to be liable. Thus was the process in an action of account become more effectual. We have before noticed that this action was allowed to executors by another chapter of this statute (*d*).

(*a*) Gaola de Fletæ.

(*b*) Vid. ant. 73.

(*c*) *Exigatur*.

(*d*) Vid. ant. 168.

Waste. A notion it seems had prevailed, that the old writ *de prohibitione vasti* (a), which issued in cases of waste, required the parties to answer only for waste done subsequent to the writ. To prevent this mistake, this writ of prohibition was wholly taken away by statute (b); and there was substituted in its place, in all cases of waste, a writ of summons; by which the party complained of was to be summoned to answer for waste done at any time. If he did not appear upon the summons, he was to be attached, and, after the attachment, distrained; and if he did not appear after the distress, the sheriff was to be commanded, *quòd assumptis secum duodecim, &c. in propria personâ*, he should go to the place wasted, and make inquiry of the waste, and return the inquisition; and upon that inquisition they were to proceed to judgment, as directed by the first statute of Westminster, ch. 21 (c). It was in another chapter (d) ordained, that when two or more had a wood, a turbary, a fishery, or the like, in common, in which neither knew what was his several right, and one of them committed waste against the will of the others, in such case an action of waste should lie; and the defendant, when judgment was to pass, should have his election to take his share in a certain part to be assigned by the sheriff, and the view of his neighbours chosen and sworn for this purpose; or to take nothing in future from the said common but what his parceners would allow. If he chose to take his share, it was to be allotted him in the place wasted. The writ in this case begun, *Cùm A. & B. teneant boscum pro indiviso, B. fecit vastum, &c.*

In favour of infants it was provided, that if they were eloiigned, and so prevented from appearing in person, their next friends might be admitted to sue for them in all cases where the infants could maintain an action (e). The

(a) Vid. ant. vol. I. 385.

(b) Ch. 14.

(c) Vid. ant. 110.

(d) Ch. 22.

(e) Ch. 15.

eloignement has been considered only as an instance stated for an example, and the statute has always been construed as giving a permission in all cases for infants to appear by their next friend; which, however, is nothing more than a confirmation of the common law.

Several regulations were made respecting ^{Of execution} process. Sheriffs used to appoint bailiffs to ^{of process.} make distresses, who were not known to be regular officers. This was sometimes done, in order to tempt persons to make resistance, and incur the penalty of contempt of the law. Thus was it made the means of extortion: but to prevent it in future it was ordained, that distresses should not be made but by bailiffs sworn and known; and that persons convicted of distraining otherwise, should restore damages to the party grieved in an action of trespass, and also be punished as for an offence against the king (a).

The execution of process by sheriffs was regulated by another chapter (b). The course of justice was much impeded by the neglect of sheriffs in making return of writs, and in making false returns. To avoid such obstacles to justice, if possible, it was directed, that persons who apprehended the negligence of sheriffs, should deliver their writs *in pleno comitatû*, or *in retro comitatû*, as it was called (which it seems was a continuation of the county court, after the hearing of causes, for collecting the king's money and other business), and that a billet should be taken from the sheriff, or under-sheriff, containing the names of the plaintiff and defendant in the writ, with the day on which the writ was delivered, and that at his request, the seal of the sheriff or under-sheriff should be affixed in testimony thereof; but if the seal was refused, the testimony of knights and other credible persons present was to be taken, and their seal affixed. After this,

(a) Ch. 37.

(b) Ch. 39.

if the sheriff did not return the writ, and complaint was made thereof to the justices, a judicial writ was to go to the justices of assise, to make inquiry, by those who were present at the delivery of the writ, what they knew of the delivery; and if it appeared, upon return of such inquisition, that the writ was delivered, damages were to be adjudged to the party grieved, in proportion to the subject to the action, and the inconvenience incurred. The same course was also to be taken when the sheriff returned, that the writ came too late to be executed.

Sheriffs sometimes returned, *mandavi ballivo*, that they had commanded the bailiff of a certain liberty, who had done nothing therein; and then they would name some liberty, which, in truth, had no return of writs. To correct this, it was ordained, that the treasurer and barons of the exchequer should deliver to the justices a roll of all the liberties, in every county, that had the return of writs. If a sheriff returned, that he commanded the bailiff of a liberty not contained in that roll, he was punished as a disheritor, says the statute, of the king. But if he returned, that he had commanded the bailiff of some liberty inserted therein, he was then commanded, *quod non omittas propter prædictam libertatem*, but to execute the writ, and *scire faciat* the bailiffs to appear, and say why they did not execute the king's writ. If they came and acquitted themselves, by saying they were not required so to do, the sheriff was to be condemned both to the lord of the liberty and to the party to the suit, who had suffered by the delay. If the bailiffs did not appear at the day, or did not on their appearance acquit themselves in the above way, in every subsequent judicial writ, through the whole action, there was to be the same clause of *non omittas*.

Another instance in which sheriffs frequently failed, was in executing the clause *de exitibus, &c.* for levying issues; sometimes returning, that there were none, or small; and sometimes saying nothing at all of issues. To such return, therefore, it was now ordained, the plaintiff

might *offerat verificare* that the sheriff could answer for larger issues; upon which a judicial writ was to go to the justices of assise to make inquiry, in presence of the sheriff, if he pleased to be there, for what issues he could answer, from the date of the writ to the return; and if it was proved that he had not answered for the whole, he was to be estreated into the exchequer for the overplus, and besides was to be amerced for the concealment. The sheriff was also enjoined by this statute to consider all rents, corn in the grange, and all moveables (except the furniture of horses and household utensils) as *issues*. Sheriffs were to be punished for their first and second offences by the justices of assise; but for the third, only *coram rege*.

It was commanded, that sheriffs should never in future return, that they were prevented from executing a writ by the interference and resistance of some potent lord, as this was a disgrace to the king's authority and crown; and whenever a sheriff was informed by his bailiffs that such resistance was made, he was to proceed immediately with the *posse comitatûs* to support him in executing the king's command. If it was proved to be false, he was immediately to commit the bailiffs to prison; if true, he was to do the same with the offenders, who should not be delivered without the special command of the king. If he was still resisted, he was to certify to the court the names of the resisters, with those who were aiding, consenting, commanding, and favouring them; who were to be attached *per corpora* by a judicial writ to appear *coram rege*; and if they were convicted, they were to be punished at the pleasure of the king.

Another complaint against sheriffs, hundredors, ^{Of summon-} and bailiffs of liberties was, that they put infirm ^{ing jurors.} persons, and those who lived out of the country, upon juries; and summoned a greater number than was necessary, only to get money for dispensing with their attendance; so that, after all, assises and juries very frequently would not be

taken, for want of jurors. It was therefore ordained (a), that in one assise no more should be summoned than twenty-four; and that old men above seventy, those who were incurably ill, or at the time of the summons were ill, or not resident in the country, should not in future be put on juries, or lesser assises; nor any one who had not some freehold of the value of twenty shillings *per ann.* within the county where the assise or jury was to be taken, or of forty shillings without it; unless they were witnesses to charters, or other writings, whose presence was absolutely necessary. As to great assises, where, on account of the small number of knights, it might be inconvenient to affix any such qualification, it would be sufficient, if they had freehold of any value in the county. If any officer offended against this act, he was to answer in damages to the party grieved, and be amerced to the king by the justices of assise, who were to hear complaints on this statute. The qualifications of jurors were altered by the statute *de iis qui ponendi in assisis*, 21 Ed. I. st. 1. which requires those who were on juries out of their counties (which was the case in trials at the bar of the courts at Westminster) to have land or tenements of one hundred shillings *per ann.* and those within the county, of forty shillings; those before justices assigned, or other ministers of the king appointed, to take inquests, juries, or other recognitions, forty shillings *per ann.*; but as to those before the justices itinerant, and in cities, boroughs, and other mercantile towns, they were to remain as at common law. Respecting jurors in general, it was enacted by stat. *articuli super chartas*, 28 Ed. I. c. 9. that such persons should be put on inquests and juries as were next neighbours; those who were most sufficient, and least suspicious; under pain of paying double damages to the party complaining, and being amerced to the king.

(a) Ch. 38.

To return to the statute of Westm. 2d. Some further regulations were made for the forwarding of suits: these we shall proceed to mention. As the law now stood, a warrantor, if, upon denying the warranty, it was found against him, suffered no other penalty but an amercement, and being obliged to warrant (*a*); but it was now thought proper to make the warrantor, in such case, lose his land, as the tenant would: and further, to prevent collusion and delay, it was provided, that where the tenant and warrantor were at issue, the demandant might pray a *venire facias*, to try the matter (*b*). We have seen what great delay was occasioned by the essoin *de malo lecti*. To prevent the long and tedious course of ascertaining the truth of this essoin by the writ *de faciendo videre* (*c*), it was now provided (*d*), that the party might, in the iter of the justices (which has been extended by construction to the common pleas), take issue whether *languidus* or not; and if it was found against the essoin, that it should be turned to a default. This essoin *de malo lecti* was wholly taken away in a writ of right between two claiming by the same descent; as between parceners. It had been enacted by stat. Marl. c. 13. (*e*) that after a person had put himself on an inquest, he should have only one essoin; but this not limiting at what precise stage he should have that essoin, and as defendants would sometimes take it upon the writ of *habeas corpora juratorum*, the consequence was, that the jurors lost their issues, and the inquest was not taken: it was therefore (principally for the ease of jurors) now provided (*f*), that the essoin should be taken at the next day; which must be upon the *venire facias*, and not after. This alteration, like that of the statute of Marlbridge, which it was meant to amend, has been construed to relate only to personal actions. Again,

(*a*) Vid. ant. vol. I. 447. (*b*) Ch. 6. (*c*) Vid. ant. vol. I. 414.

(*d*) Ch. 17. (*e*) Vid. ant. 75. (*f*) Ch. 27.

as at common law, no essoin was to be allowed, where a day was given *prece partium*, and the parties agreed to come without an essoin (*a*). Again, whereas by the stat. Westm. 1st. (*b*) an essoin was taken from the tenant in certain assises, after appearance, it was now in like cases to be taken from the demandant (*c*).

The *view*, which likewise created much delay in real actions, was dispensed with in some instances. It was ordained (*d*), that where land was lost by default, and the loser brought a new action; and where a writ was abated by a dilatory exception, after a view, as by non-tenure, or misnaming of the place; no view should be granted in a second action. In the following cases there was to be no view at all: in a writ of dower, where the land was aliened to the tenant and his ancestor, for he could not but know the land himself; in a writ of entry, after a former writ quashed for assigning the entry wrong, in which there had been a view; and in all writs grounded upon a demise to the tenant *himself* from the plaintiff or his ancestors, *dum fuit infra ætatem, non compos, in prisonâ*, and the like. In these provisions, the legislature seems to have acted upon the principles which governed on this subject, in the latter reign (*e*).

The other improvements made in the administration of justice were of a more striking nature than those that have just been mentioned, and claim a more particular regard: such as, an execution given against land by *elegit*; the introduction of bills of exception; and the proceeding by *scire facias* to revive a judgment of a year's standing. These we shall speak of first, as more worthy the consideration of a modern reader. The remainder of this statute relates

(*a*) At common law, an essoin was allowed on a day given *prece partium*; but not if expressly given *sine essonio*. Compare ant. vol. I. 409, 410, with 412.

(*b*) Viz. ch. 42. Vid. ant. 122. (*c*) Ch. 28. (*d*) Ch. 48.

(*e*) Vid. ant. vol. I. 433.

to the real remedies so much practised in those days, and which we have reserved to be thrown together at the conclusion of these provisions for the better administration of civil justice.

Both Glanville and Bracton pass over personal actions so slightly, as to give us no information concerning the execution that might be had thereon. We have seen, that there was a process against the chattels and the land also to compel an appearance (*a*), and in cases of outlawry, both might be taken; but it does not appear, that the land, like the goods, was ever sold, or delivered to the plaintiff in satisfaction of his debt. It was only in real actions that the land was taken; except, indeed, in the cases provided for by the late statute *de mercatoribus* (*b*). But now it was enacted as follows: that when a debt was recovered or acknowledged, or damages adjudged, in the king's court, the plaintiff should have his *election*, either to have a writ, *quòd vicecomis FIERI FACIAT* (*c*) *de terris et catallis*; or one commanding, *quòd vicecomes liberet ei omnia catalla debitoris (exceptis bobus, et affris carucæ), ET MEDIETATEM TERRÆ SUÆ, quousq; debitum fuerit levatum, per rationabile pretium, vel extentam*. The statute ordained, that if a person was ejected from a freehold so delivered to him, he should have his writ of novel disseisin, and re-

(*a*) Vid. ant. vol. I. 483.

(*b*) Vid. ant. 158.

(*c*) The common language of our law-books has been, that the writs of *levari facias* and *fieri facias* were at the common law. Considering the silence of Glanville and Bracton about execution in personal actions, there is no direct authority either to contradict or support that opinion. It seems, however, doubtful whether those writs *eo nomine* are of such ancient date; and it is not improbable, that the latter might have obtained both its name and existence from the words of this act. From the mere penning of the statute, the *fieri facias* appears as much a new regulation as the *medietatem terræ*. It is probable, that the *distringas per terras et catalla*, which was the mesne process in personal actions, was the process of execution likewise. The legislature seem to have an eye to this process in the terms *de terris et catallis*. But the writ of *fieri facias*, properly so called, never contained any thing *de terris*. This defect is supplied by the *levari facias*. Thus these two writs reach all the objects that could be touched by the old process of *distringas*; and were with that view, perhaps, framed after this act, if not upon the authority of it. Vid. ant. 132.

disseisin, if necessary (a). Upon this there was framed a writ of execution, called an *elegit*, from the words of the statute; and if a plaintiff or conusee prayed this writ, the entry on the roll was, *quòd ELEGIT sibi executionem fieri de omnibus catallis, et medietate terræ, &c.* and the writ was, *ac cùm idem H. juxta statutum inde editum ELEGERIT SIBI LIBERARI pro prædictis 20 libris omnia catalla, et medietatem terræ ipsius R. &c* (b). Thus was land made directly liable to answer for debts, contrary to the general policy of the feudal institution. We have seen, that in the case of a merchant, lands of a particular kind might be taken in execution; but after this general authority had been given to take lands by writ of *elegit*, the merchant's security was enlarged still further, by the second statute on that subject; so that the whole of a man's land was made liable to a statute-merchant, while only half could be taken by *elegit*.

The reason for ordaining (c) a *bill of exceptions* was this: a writ of error might be had, whenever there was error on the record. But it sometimes happened, that the parties might allege matter of exception *ore tenus* in court, as the method was in these days, which the justices would over-rule; and matter that was so over-ruled, as it was never entered upon the record, could not be assigned for error. It was therefore now provided (d) as follows: that where any one was impleaded before the justices, and proposed any exception, and prayed it might be allowed, but the justices would not allow it; then he might write down the exception, and pray the justices to put their seals to it,

(a) Ch. 18.

(b) 2 Inst. 395.

(c) It appears from the following case, that a *bill* was a mandate of an authority inferior to that of a *writ*. In 8 Ed. II. upon an issue whether ancient demesne or not; a *bill* sealed with the seal of one of the justices of the bench was sent to the treasurer and barons of the exchequer to certify the court of the fact; but they paid no regard to the mandate, as it was only a *bill*; and therefore the same justice sent a writ, returnable in the bench at a general return day. Mayn. 277.

(d) Ch. 31.

which they should do; and if one refused, another might do it. If, after this, the king, upon complaint of what the justices had done, caused the record to come before him, and that exception was not found therein, and the complainant shewed it written down, with the seal of the justice appendant, then the justice should be commanded to appear at a certain day to acknowledge or deny his seal; and if it was not denied, then they were to proceed and determine, whether that exception ought to have been refused or not. After this statute it should seem, that most points of law, whether upon the record or not, might be re-examined in a writ of error.

The nature of the provision about a *scire facias* on a judgment cannot be better understood, than from a rehearsal of the statute itself. Because, says the act (a), *Scire facias.* where a matter is recorded before the chancellor and the king's justices of record, and enrolled in their rolls, there ought not be thereon the common process of an action, by summons, attachment, essoin, view of land, and other solemnities of proceeding that are usual in cases of contracts and covenants made out of court; therefore, for the future, all things enrolled in a court of record, or contained in fines, whether they are contracts, covenants, obligations, services, customs, recognizances, or whatever they may be, if enrolled, and such a matter to which the king's court might, by the law and custom of the realm, give the authority of a record, shall have such consideration and sanction, as for it not to be needful to make them again the subject of a regular action and pleading; that is, by summons, attachment, and so on, as above-mentioned. But when complaint shall be made thereon to the court, and the acknowledgments or *fine* is a recent one, that is, within a year, then a writ of execution shall be had; but if it is of longer date, the sheriff shall be commanded, *quòd*

(a) Ch. 45.

scire faciat the party of whom the complaint is, to appear at a certain day, and shew cause why what was contained in the roll or the fine should not be executed. If the party appeared not, or could say nothing why execution should not be had, the sheriff was to be commanded to do execution thereof. It should seem, that this statute, from the mention of contracts, covenants, and the like, first gave a *scire facias* in personal actions (that writ being, as we have seen, not uncommonly used in real actions); and that before this act, it had been usual to bring a fresh action upon the judgment.

We come now to the additions which this statute made to the number of real remedies before in use. These we shall speak of nearly in the order in which they were made. The first provision of this kind was in favour of a wife whose husband held land in her right. We have before seen, that where a husband *aliened* a freehold that he had in right of his wife, she, after his death, might have a writ of entry, since called a *cui in vitâ*, to recover it back again (*a*). It seemed hard, that when a husband had lost such land by *default*, the wife, after his death, should not have the same remedy, but was to be driven to bring a writ of right. It was therefore ordained (*b*), that in such case the woman should have a writ of entry, *cui ipsa in vitâ suâ contradicere non potuit*; which should be conducted in the following way: If the tenant pleaded against the demand of the wife, that he entered by judgment, and it turned out to have been by default, then he was to answer over to the title under which he claimed upon the first writ brought against the husband and wife; and if he could make out none, it was ordained, that the woman should recover, notwithstanding the default. Again, if a husband refused to defend an

(*a*) Vid. ant. vol. I. 393.

(*b*) Ch. 3.

action brought for the wife's land, she might, upon her prayer, be received to defend her right (*a*).

In like manner, when a tenant in dower, or *per legem Angliæ*, or otherwise for term of life, or by any gift where the reversion was reserved, made default, the heirs, and those entitled to the reversion, were to be received to answer, if they came before judgment; and if judgment had been passed, either by default or reddition, then, after the death of such tenant, they might have a writ of entry with like process as that above-mentioned.

Where a person aliened any land held in right of his wife, it was ordained (*b*), that, after the death of the husband, the woman or her heir should not be delayed by the nonage of the heir who ought to warrant; but a purchaser was to stay till the age of his warrantor, before he should avail himself of his warranty; for he could not be ignorant that he was purchasing the right of another person, and therefore deserved no favour.

Further provision was made in cases of dower. It was declared (*c*), consistently with what the law had uniformly pronounced (*d*), that where a husband, being impleaded, had given up the land demanded to his adversary *de plano*, that is, by a regular judicial surrender, the justices, upon a writ of dower, should adjudge the wife her dower. But where the land was lost by default, there was a difference of opinion; some justices holding that the widow was, in such case, entitled to dower; others, that she was not (*e*). To re-

(*a*) Vid. ant. 151, the first law for receipt.

(*b*) Ch. 40.

(*c*) Ch. 4.

(*d*) Vid. ant. vol. I. 101.

(*e*) This losing of land by default, was nothing more than another instance, where a feigned recovery was made use of to avoid certain restrictions imposed by the law of estates. A recovery having all the forms of a judicial proceeding, without any visible collusion, as in the former case, we find that the judges were startled with its apparent legality, and some held it to convey a clear unincumbered title. We shall see that, in the course of two centuries, the judges in *Taltarum's* case came to an agreement in favour of a feigned recovery, and adjudged it to convey a title, clear of all possible claims. Vid. ant. 155.

move this doubt, it was now declared, that a woman claiming her dower should be heard in this case, as in the former; and if it was objected to her that her husband lost the land by judgment, so that she ought not to have any dower, and upon inquiry it was found to be a judgment by default; then that the tenant should further shew what he had a right to according to the writ which he had first brought against the husband; and if he proved her husband had no right, nor any one but himself, then that the judgment should be, *quòd tenens recedat quietus*, and *quòd uxor nihil capiat de dote*; but if he could not shew that, then that the woman should have judgment, *quòd recuperet dotem suam*: The same where a woman (a) being endowed, or a person tenant *per maritagium*, *per legem Angliæ*, for term of life, or in fee-tail, lost by default. Moreover, when these tenants claimed their lands so lost by default, and came to such a stage in the pleading as to be obliged to shew their right, which they could not do without the aid of their reversioner; they were, by this statute, permitted to vouch such reversioners to warranty, the same as if they were tenants in the suit; and when the warrantor appeared, the suit was to go on between him and the person in seisin, according to the tenor and form of the writ which had been first brought, and upon which the recovery had been by default; and so from several actions, says the statute, they would come to one judgment, namely, either that the demandant recover his demand, or the tenant go quit.

Again, when a woman, having no title to dower, brought a writ of dower, during the infancy of the heir, against the guarding, and he, out of favour to her, made a reddition of the dower, or made default, or defended the suit so collusively that the dower was adjudged to her in

(a) This was not a novelty; for it was the practice in the times both of Glanville and Bracton, that the widow in dower *unde nihil* should not be answered, unless she produced her warrantor, that is, her reversioner. Vid. ant. vol. I. 379.

prejudice of the heir ; it was now provided, that the heir, when he came of age, might demand the seisin of his ancestor against her, as against any other *deforcesor* ; so, however, as she should still have her exception to shew her right to dower, and, if she made it out, should go quit and retain her dower, and the heir be amerced at the discretion of the justices; but if not, that the heir should recover his demand.

In like manner, if the heir or any other impleaded a woman for her dower, and she lost it by default, the default was not to preclude her from recovering it back again if she had right; which she might do by the following writ: *Præcipe A. quòd justè, &c. reddat tali quæ fuit uxor tali tantam terram cum pertinentiis in N. quam clamat esse rationabilem dotem suam (a), et quam talis EI DEFORCEAT, &c.* which writ has since been commonly called a *quod ei deforceat (b)*. To this writ the tenant might plead, that she had no right to be endowed; and if he could make it out, he was to go quit; if not, she was to recover the land whereof she had been before endowed. Again, a man losing his land by default, had no remedy except a writ of right; but this writ could only be maintained by such as claimed the mere right, which tenants for term of life, *per liberum maritagium*, or in fee-tail, could not, as there was a reversion in some one else; it was therefore provided, that such defaults should not be wholly prejudicial to the defaulters; and several new writs of *deforceat* were given by this statute instead of the writ of right. The *quòd ei deforceat* for a tenant *in maritagio* was thus: *Præcipe A. quòd justè, &c. reddat B. tale manerium de C. cum pertinentiis quod clamat esse jus et maritagium suum, et QUOD prædictus A. EI DEFORCEAT*; that for a tenant for life, *quod clamat tenere ad terminum vitæ; et QUOD prædictus A. EI DEFORCEAT*; that for a tenant in fee-tail, *quod clamat tenere*

(a) Or, *de rationabili dotè suâ*.

(b) Vid. ant. vol. I. 395.

sibi et heredibus suis de corpore suo legitime procreatis, et QUOD prædictus A. EI DEFORCEAT. Such were the provisions of this statute ordaining the writ of *quòd ei deforceat* for persons possessed of a particular estate.

The writs framed by the last statute were designed as substitutes for the writ of right, either where a recurrence to that hazardous remedy would be inconvenient, or where the persons injured had no title by law to that writ. The statute which follows (a), made some regulations upon the same principle in case of usurpation of churches. This act is very full, and needs no other explanation than what the mere statement of it will give. It begins by saying, that there being three original writs of advowson of churches; one of them *de recto*, the other two *de possessione*, namely, that of *ultimæ præsentationis*, and that of *quare impedit* (b); it had been the law and custom of the realm, that when a person having right presented to a church a clerk who was admitted, the true patron could recover his advowson by none but a writ of right which was to be tried by the great assise, or by the duel; whence it followed, that heirs within age, through the fraud or negligence of their guardians; and heirs, whether of age or not, through the fraud or negligence of tenants *per legem Angliæ*, tenants in dower, for life, for years, or in fee-tail, were many times disinherited of their advowsons, or at least put to their writ of right, and perhaps in the event wholly disinherited.

This was the grievance for which it was now intended to provide; by preventing such presentations from being prejudicial to the right heirs, or those in reversion after the death of particular tenants. For this purpose it was enacted, that as often as any person, having no right, should present during the wardship of the heir, or during the time of tenants in dower, *per legem Angliæ*, or other-

(a) Ch. 5. (b) Of the writ *quare impedit*, &c. vid. ant. vol. I. 355.

wise for term of life or years, or in fee-tail; at the next avoidance, when the heir was of full age, or when he came into the reversion (*a*), after the death of the before-mentioned particular tenants, he should have such possessory writ of advowson as his last ancestor would have had when the last avoidance happened in his time, or before the demise was made for a term, or in fee-tail, as before-mentioned. The same of presentation to churches of the advowson of married women, during the time they were *sub potestate viri*; the same of religious men, as archbishops, bishops, rectors of churches, and other ecclesiastical persons, who were all aided by this statute, in case of presentations made by persons having no right, during the time such houses, prelacies, parsonages, or dignities, were vacant (*b*). However, this act was not to be construed as entitling an heir or reversioner to recover, upon suggestion that any of the before-mentioned particular tenants lost by feigned defences, as all judgments were to remain in force till reversed for error, or annulled by attaint or certificate.

Many other particulars upon the same subject were ordained by this act. (*c*) We have seen, the tenant in a *quare impedit* might plead, that before the writ was brought, the church was full of a parson presented by him; and this was a good plea to bar the action: but it was now ordained, that one form of pleading should be observed in writs *ultimæ præsentationis* and of *quare impedit*, and that the action should not fail by reason of such plenarty, so as the writ was purchased *infra tempus semestris*, within six months, though the party could not recover his presentation within the six

(*a*) The words of the statute are, *postquam advocatio post mortem in forma prædictâ tenentium* (one of whom is a tenant in tail) *ad hæredem*—REVERTITUR, &c. which corresponds exactly with the passage before quoted from Britton; and is another instance to shew, that the legislature considered the statute *de donis* as giving only an estate for life to the tenant in tail, and a reversion to the issue. Vid. ant. 166.

(*b*) Sect. 1.

(*c*) Vid. ant. vol. I. 145. 357. (*a*)

months. Sometimes an agreement was made between several persons claiming one advowson, and enrolled before the justices in a roll or fine, to this effect; that one should present on the first avoidance, another on the second, another on the third, and so on. It was now ordained, that should any be disturbed in such his presentation, he need not bring a *quare impedit*, but should resort to the roll or fine; and the sheriff should be commanded, *quòd scire faciat* the party disturbing, to appear at a short day, as fifteen days or three weeks, according to the distance of the place, to shew what he could allege, wherefore the party complaining should not present; and if he did not come, or could not allege any thing done since the fine to bar him, the complainant was to recover the presentation.

It was provided, that if, after the death of the person last presenting, the advowson was assigned in dower, or came to a tenant *per legem Angliæ* who presented, and the heir, after their deaths, was disturbed; he might, at his election, have either a writ *ultimæ præsentationis*, or of *quare impedit*. The like of advowsons demised for term of life or of years, or in fee-tail (a). In writs of *quare impedit* and *ultimæ præsentationis*, damages were henceforth to be awarded, if the six months elapsed through the disturbance of any one, and the bishop presented; the statute ordains these damages to be to two years value of the church. If the six months are not past, and the presentation is de-raigned within that time, the damages are only to be half a year's value: if, in the former case of presentation by lapse, the disturber has nothing to pay, he is to be imprisoned for two years; and in the latter, where the advowson was de-raigned within the six months, he is to be punished by imprisonment for half a year (b). These writs were thenceforward granted for chapels, prebends, vicarages, hospitals, abbies, priories, and other houses of the advowson of others; of all which they did not lie at common law (c).

(a) Sect. 2.

(b) Sect. 3.

(c) Vid. ant. vol. I. 352.

It was ordained by the same statute, that when a person was prohibited from demanding tithes in another parish by the writ of *indicavit* (a), the patron of the parson so prohibited should have a writ to demand the advowson of the tithes in question; and that when this plea was deraigned or decided for the demandant, then the plea in the ecclesiastical court might proceed (b). Upon this clause a writ of right *de advocacione decimarum* was formed (c). It was declared, that when one parcener presented to an advowson, and usurped upon another, he, on whom the usurpation was made, should not be wholly barred by his negligence, but should be permitted to present, when his turn came again (d).

Some statutes were passed concerning ad- Admeasure-
measurement of dower and pasture (e), and ment of dower
the condition of tenants in demesne with and pasture.
respect to their mesne and the chief lords. As the law now stood, if an heir within age assigned dower before the guardian in chivalry entered, the guardian could not compel an admeasurement thereof. It was therefore now enacted, that a writ of admeasurement of dower should be granted to a guardian; and if he should prosecute the writ collusively, the heir was not to be barred thereby from admeasuring it. A speedier process was directed both in this writ and that for admeasurement of pasture. When it was come to the great distress, a day was to be given, within which (f) two counties might be holden, and open proclamation was to be made for the defendant to come in at the day named in the writ; at which day if he came not, and the proclamation was testified by the sheriff, admeasurement was to be made by default (g).

Pasture was admeasured sometimes *coram justitiariis* (h),

(a) Vid. ant. vol. I. 141. 453. (b) Sect. 4. (c) 2 Inst. 364.

(d) Sect. 5. (e) Vid. ant. vol. I. 384.

(f) To effect this, the scheme of continuances fixed by the statute of *dies communes in banco* must sometimes be disturbed, and dispensed with. Vid. ant. 58.

(g) Ch. 7. (h) Vid. ant. vol. I. 343.

sometimes in the county before the sheriff. It might happen that the pasture, after such admeasurement, was surcharged again by the same person with more beasts; it was therefore now ordained, that upon the second surcharge, the complainant should have the following remedy: If the admeasurement had been *coram justitiariis*, he should have a judicial writ to the sheriff, commanding him, in the presence of the parties summoned, if they chose to appear, to inquire *de secundâ superoneratione*. If the second surcharge was found, it was to be returned before the justices, under the seal of the sheriff, and the seals of the jurors: upon which the justices were to award damages, and estreat the value of the beasts put into the pasture after such admeasurement, more than ought to have been; and such estreats were to be delivered to the barons of the exchequer, like others, to be answered for to the king. If the admeasurement had been made in the county, then the plaintiff might have a writ out of chancery for the sheriff to inquire of the surcharge; and the sheriff was to answer to the exchequer for all the beasts put into the pasture above the proper number. That the sheriff might not defraud the king in such cases, a very particular course was directed; that all writs *de secundâ superoneratione* that issued out of chancery should be inrolled, and at the year's end transcripts of them be sent into the exchequer under the seal of the chancellor, that the treasurer and barons might see how the sheriffs answered for the produce of them. It was directed, that writs of re-disseisin likewise should be enrolled in the same manner, and sent into the exchequer at the end of the year (a).

The grievances suffered by tenants in demesne in consequence of any failure in the mesne lord, were very great. The law allowed a chief lord to distrain any where within his fee for his services and customs: the distress might

(a) Ch. 8.

therefore fall upon a tenant who had a mesne lord, that was bound to acquit him towards the chief lord: such tenant, however, after he had replevied the distress, could not deny the title of the chief lord to his services and customs; and when he proceeded by writ of mesne against the mesne lord, *he* would perhaps stand out the long process of that writ. All this might happen, when the mesne was able enough to make good the demand; but it became much worse, when he was not. Again, though the law allowed such tenants in demesne to acquit themselves by paying to the chief lord the demands he had upon the mesne, yet the chief would sometimes refuse it, and persist in receiving them at the hands of his next tenant only; so that tenants in demesne might be ruined through the obstinacy of their chief, and the insufficiency of their mesne lord, though they themselves were able to pay all demands properly due from themselves. All these grievances required some redress, which was provided in the following way.

It was directed, that the tenant in demesne, as soon as he was distrained, should purchase his writ of mesne against the lord that was mesne between him and the chief lord; and if he absented himself till the great distress awarded, and had land in the same county, that the plaintiff should have a day given in the writ of great distress, before the coming of which two counties (*a*) might be held; and the sheriff should be commanded to distrain the mesne by the great distress, and likewise to cause him to be proclaimed in two full counties, to appear at the day contained in the writ, and answer to the complaint. If he did not appear, he was to lose the services of his tenant, who was no longer to answer to *him* for any of them, but was, for the future, to do such services and customs to the chief lord, as he before did to the mesne; and if the chief exacted more, the tenant was to have all those exceptions which the mesne might have. If the mesne had no property, the tenant was, nevertheless, to prosecute his writ of mesne; and if the she-

(*a*) Vid. ant. 197.

riff returned, that he had nothing whereby he might be summoned, then an *attachment* was to go; and if the sheriff returned, that he had nothing whereby he could be attached, still the writ of *great distress* was to issue, and the proclamation to be made in the above form, in order to give the tenant the effect of the mesne being forejudged of his fee and services, as before directed. Again, if the mesne had no land in the county where the distress was taken, an original writ of summons was to issue in that county; and upon the sheriff returning, that he had nothing in that county, a judicial writ of summons was to issue against him in the county where it was *testified* his land was; and suit was to be made in that county, till it came to the great distress, and proclamation, as before-mentioned. Where it happened that the tenant in demesne was infeoffed to hold by less services than the mesne was bound to do to the chief lord, and he was attorned to the chief lord after the forejudger of the mesne, in the above way, and the mesne excluded, he was nevertheless to answer to the chief lord for all such services as the mesne was bound to.

This was to be the course, when the mesne did not appear; but if he did, and confessed he ought to acquit his tenant; or if he was compelled by judgment to acquit him, and after such confession, or judgment, complaint was made that he did not acquit him; then a writ judicial was to issue for the sheriff to distrain him to acquit his tenant, and to be at a certain day before the justices, to shew why he had not acquitted him. When they had proceeded to the great distress, the plaintiff was to be heard; and if he could prove that he had not, the mesne was to satisfy him in damages, and the tenant to go quit, and be attorned to the chief lord. If he came not at the first distress, another distress was to issue, and proclamation to be made; and upon the return of it, there was to be a judgment, as before-mentioned.

It was not intended by this statute, to exclude tenants from any remedy they had against their mesne at common law. This statute was continued to cases, where there was *one* mesne only between the chief lord and the tenant, where that mesne was of full age, and where the tenant might attorn to the chief lord without prejudice to any one but the mesne only. This was to except tenants in dower, tenants *per legem Angliæ*, or for life, or in fee-tail, for whom no remedy was intended by this statute; though, at the latter end of it, there is a promise that provision should be made for them (a).

To go on with the same subject of real remedies; we shall now mention what alteration the parliament made respecting pleading in the writ *de consanguinitate*; and how the writs of *cessavit*, of nuisance, *juris utrùm*, assise, and re-disseisin, were extended to new cases, to which they did not before apply.

It had been a common answer to a writ of mortaucestor, that the demandant was not next heir of the ancestor by whose death he demanded the land: it was now ordained, that in writs *de consanguinitate*, *avo*, and *proavo* (being of the same nature with a writ of mortaucestor), the same answer should be admitted (b). We have seen, that by the statute of Gloucester (c), a writ of *cessavit* was given against tenants in fee-farm who suffered the land to lie fresh: it was now ordained generally, that if any withheld from his lord his due and accustomed services for two years, the lord should have an action to recover his land in demesne by the following writ: *Præcipe A. quòd justè, &c. reddat B. tale tenementum quod A. de eo tenuit per tale servitium, et quod ad prædictum B. reverti debet, eò quòd prædictus A. in faciendop prædictum servitium PER BIENNIIUM CESSAVIT, ut dicitur*: and that, not only in this case,

(a) Ch. 9.

(b) Ch. 20. Vid. ant. vol. I. 363.

(c) Viz. ch. 4. Vid. ant. 145.

but also in cases within the statute of Gloucester, writs of entry should be had for the heir of the demandant against the heir of the tenant, and against those to whom such land should be aliened (a).

Writs *in consimili casu*.

The 24th chapter of this statute deserves particular notice, as having a very extensive influence on the course of legal remedies in succeeding times. In the first place, it declares (b), that in cases where complainants were entitled to a writ in the chancery, grounded upon the fact of another (c), the complainants should not depart from the king's court without remedy, because the land was transferred from one to another; as because there was no writ in the register in the chancery to be found adapted exactly to that special case, but the form of the writ was only to be had against the very person who actually raised the nuisance; so that should the house, wall, or the like, which occasioned the nuisance, be aliened to another, a writ was denied. That justice might no longer be delayed for want of legal remedies, it was now enacted, that when a writ was granted in one case, and a thing happened *in consimili casu*, and needing a similar remedy, a writ should be made accordingly. Then the statute gives this instance of a similar form: *Questus est nobis A. quòd B. injustè, &c. levavit domum, murum, mercatum, et alia quæ sunt ad nocumentum, &c.* And if the nuisance levied was aliened from one to another, then it was to be thus: *Questus est nobis A. quòd B. et C. levaverunt, &c.* against both. In like manner as a parson of a church might recover common of pasture by writ of novel disseisin, it was ordained, that from thenceforth his successor should have a *quòd permittat* against the disseisor or his heir; though a like writ, says the statute (d), was never before granted out of the chancery.

(a) Ch. 21.

(b) Ch. 24.

(c) *De facto alicujus*.

(d) So says the statute; but this writ was a known and established remedy in such case in the time of Bracton. Vid. ant. vol. I. 366.

Again, as a writ had long been had to try *utrùm aliquod tenementum sit libera eleemosyna alicujus ecclesiæ vel laicum fædum talis* (a), in future there was to be a writ to try *utrùm sit libera eleemosyna talis ecclesiæ, vel alterius ecclesiæ*, in instances where it was a contest between two churches to which the freehold belonged.

After the statute had given permission to extend several writs in the above way, there follows this general clause :
 “ And as often as it shall happen in the chancery, *quòd in uno casu reperitur breve, et in consimili casu, cadente sub eodem jure, et simili indigente remedio, non reperitur* ;
 “ then the *clerici*, or clerks of the chancery, shall agree in making a writ, or adjourn the complainant to the next parliament, and write the case in which they could not agree, and refer it to the parliament, when a writ should be made with the advice of persons learned in the law ; lest it might happen that the king’s court should for a long time fail in administering justice to complainants.” The clerks here spoken of are no doubt the same as the persons said by Bracton to be employed in making out *brevia magistralia*. These writs are said by that author to be varied, according as cases differed ; and, it should seem, they were put in contradistinction to the *brevia formata*, that were not subject to such variation, without permission of the legislature (b). Thus it appears, a sort of liberty had always been exercised by the clerks in chancery of adapting the forms of writs to particular cases. It is probable, that this discretion might have been exercised under the direction or controul of the council, which was resorted to on very particular occasions, where there was a doubt or difficulty which the clerks could not settle among themselves. It was to preclude the necessity of recurring to a higher authority, and to relieve that authority from

(a) Vid. ant. vol. I. 186. 366. 369.

(b) Vid. ant. vol. I. 232.

the burthen of such applications, that this statute confirmed and enlarged the power of the clerks in chancery; though it still leaves the choice of an application to parliament. The use that was afterwards made of this statute, in devising writs *in consimili casu*, will be seen hereafter. Of the many new writs that sprung from this parliamentary permission, one was emphatically called a writ of entry *in consimili casu*. The statute of Gloucester had given a writ of entry to the reversioner, where a tenant in dower aliened in fee; which writ has been usually called *in casu proviso* (a): the alienation of a tenant by the courtesy was thought to be *in consimili casu* with the former; and upon that idea such a writ was framed for the reversioner. This may serve, for the present, as an example of what were considered at that time as *similar cases* within the meaning of this act.

It should seem from the next chapter of this statute, that the following were not considered by the legislature as cases of this sort. The writ of novel disseisin being the speediest remedy in the chancery, it was thought proper to extend it further than it had yet gone. It was therefore ordained (b), that it should lie of estovers of woods; profits to be taken in woods by gathering nuts, acorns, and the like fruits; for a corody; for delivery of corn and other victuals and necessities to be received yearly in a place certain; for toll, ~~trouage~~ passage, pontage, and the like, to be taken in places certain; for the custody of parks, woods, forests, chaces, warrens, gates, and other bailiwicks and offices in fee; and in all the before-mentioned cases the writ was to be expressed *de libero tenemento*, as was the form before. As heretofore (c) it lay in common of pasture, it was now to be granted in common of turbary, piscary, and the like commons, whether appendant to freeholds, or without a freehold by special deed, at least for term of life. Further,

(a) Vid. ant. 147.

(b) Ch. 25.

(c) Vid. ant. vol. I. 190. 342.

when a tenant for years, or in ward, aliened in fee, and by such alienation the freehold passed to the feoffee, it was ordained, that there should be a remedy by writ of novel disseisin; and that as well the feoffor as the feoffee should be taken for disseisors; so that during the life of either of them the writ should lie; and if either of the parties died, then there should be a writ of entry. Some of the cases here mentioned, are said by the statute, and truly, to be such as could not be redressed by an assise at common law.

A piece of law that seemed to be thoroughly understood in the last reign, was now entertained with some scruple (a). Some had doubted whether, in case of pasturing under a claim of common in the several land of another, the remedy by assise would lie: to remove this doubt, it was now declared that it should. Where any false exception was made to defer the taking of the assise; as that another writ of a higher nature was depending for the same land; and to maintain such exception, rolls or records were vouched to warranty, in order to create delay, while the persons in possession received the rents and other profits; it was now ordained, that though at common law the only penalty in failing to prove such exception was, that the assise passed; yet that the tenant should in future be judged for a disseisor, without taking the assise; and also that he should restore double damages, and suffer a year's imprisonment. If such exception was alleged by a bailiff, neither the taking of the assise, nor judgment for restitution of the freehold and damages, were to be delayed. However, should the master of such bailiff afterwards come before the justices, and allege that a writ of a higher nature was depending, or the like exception, a writ of *venire facias recordum* was to be granted; and if, upon the return, it appeared to the justices, that the record

(a) Vid. ant. vol. I. 338; and ant. 51.

would have barred the writ if produced, it was ordained, that the other party should be warned to appear to give restitution of his seisin and damages to the defendant, and that he who first recovered should be punished by imprisonment, at the discretion of the justices. Further, if there were any writings, or deeds of release, or the like, which were not (nor could by a bailiff be) shewn to the jurors, the justices, on sight thereof, were to cause the party recovering, and also the jurors of the same assise, to be warned to appear; and if it was found by the assise that the writings were true, he who brought the assise, contrary to his own deed, was to be punished, as before mentioned. Further, it was ordained, in all assises, that the sheriff should no longer take an ox of the disseisee (a), but of the disseisor only; and if there were many disseisors named in one writ, yet that he should have only one ox. The ox was not to be of more than five shillings price; nor was he to take more than that price in lieu of it.

The remedy given to the defendant after the assise and judgment had passed, was, as we have seen, called (b) a *certificate* of assise; and now it was allowed by the former branch of this statute upon matters of record; by the latter, upon deeds and quit-claim; and this was to be not only in the assise of novel disseisin, but in those of *darrein presentment*, *juris utrùm*, and *mortauncestor*.

Several additions were made to some provisions of the statute of Merton. The provisions of the statute of Merton, and likewise of the statute of Marlbridge, about re-disseisins (c), had three additions made thereto by chapter 26. of this act. First, double damages were in future to be given in writs of re-disseisin; secondly, re-disseisors were not to be replevisable by the common writ, that is, by the

(a) Vid. ant. vol. I. 340.

(b) Vid. ant. vol. I. 376.

(c) Vid. ant. vol. I. 263. and ant. 76.

writ *de homine replegiando*; and, thirdly, whereas in the statute of Merton, that writ was provided for such as were disseised after they had recovered *by assise* of novel disseisin, of mortaucestor, or by juries; it was now to lie for those who recovered by default, reddition, or otherwise, without any recognition either of assise or jury (a).

By chap. 35. of this act, several alterations were made in the statute of Merton (b) concerning the taking away of wards; as will be easily seen by comparing the two statutes. The present statute enacts (c) concerning children, male or female, whose marriage belonged to another, *raptis et abductis*, taken and carried away, that if the person, *qui raptuit*, had no right in the marriage, yet, though he restored the child unmarried, or paid for the marriage, he should nevertheless be punished for the offence by two years imprisonment: and if he did not restore the child, or married it after the years of consent, and was not able to make satisfaction for the value of the marriage, he should abjure the realm, or suffer perpetual imprisonment. The following writ in such case was given for the plaintiff, called since a writ of *ravishment of ward*: *Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium, &c. quòd sit coram, &c. ostensurus quare talem hæredem infra ætatem existentem, cujus maritagium ad ipsum pertinet, tali loco inventum RAPUIT ET ABDUXIT contra voluntatem ipsius A. et contra pacem nostram, &c.* If the heir was in the same county, then this clause was added: *Et diligenter inquiras ubi ille hæres sit in ballivâ tuâ, et ipsum, ubicunque fuerit inventus, capias et salvò et secure custodias, ita quòd eum habeas coram præfatis justic' &c. ad præf. terminum, ad reddendum cui prædictorum A. vel B. reddi debeat, &c.* Upon this there issued process of distress, if he had any thing to be distrained by; and if he had nothing, and did not appear, he was to be exacted and outlawed.

(a) Ch. 26.

(b) Vid. ant. vol. I. 260.

(c) Ch. 35.

If the heir was conveyed into another county, a writ to the same effect issued to the sheriff of that county. If the heir died before he was found, or before he was restored to the plaintiff, the suit was yet to go on, as the ravisher was still to be punished for the offence. Again, if the plaintiff died before the suit was determined, it was to be re-summoned at the suit of the heir; and if the ward belonged to the plaintiff by gift or sale, then at the suit of his executors. If the defendant died, the action was in like manner to go on between the plaintiff and his heirs or executors by re-summons; though the punishment of imprisonment was not to extend to them. In like manner, in the writ *de communi custodiâ*, which begun, *Præcipe tali, &c. quòd reddat, &c.* (meaning the writ of right of ward); if either party died, it was to be re-summoned, with distress, and proclamation at three county courts; and if the defendant came not, judgment was to pass; with a saving of his right, if he would afterwards claim it. The same, says the statute, shall be done in the writ *de transgressione*, wherein a person complained that he was *ejected* from wardships. Ejectment of ward. This is the first mention of the writ *de ejectione custodiæ*, or *ejectment of ward*.

Notwithstanding what has been said on the case of ward and marriage of an infant heir, when he had two inheritances, one descended (a) *ex parte patris* which was held of one lord, and another *ex parte matris* which was held of another, a doubt is expressed in this statute to which of the lords the marriage of the heir should belong. To settle this, it was now declared (b), that the marriage should belong to that lord by whom the child's ancestor was first infeoffed; not having respect to the sex, nor to the quantity of land, but only to the more ancient feoffment by knight's service; which merely established this point of

(a) Vid. ant. vol. I. 285, &c.

(b) Ch. 16.

law upon the foot on which it stood in the times of Glanville and Bracton.

Another provision of the statute of Merton (*a*) was extended by a subsequent chapter (*b*) of this statute. The regulation made concerning tenants encroaching on their lords was extended to neighbours, who had as little or less right than a lord's own tenants to encroach on his wastes. This was to hold good in all cases where pasture was claimed as appurtenant to their tenements: but where common was claimed by special grant, or feoffment, for a certain number of cattle; there, upon the principle that *conventio vincit legem*, the person intitled was to recover conformably with the terms of the grant. It was enacted, that no person should, in future, be liable to an assise of common of pasture, on account of any windmill, sheepcote, dairy, or the necessary enlarging of a court or curtelage. Where a person having right to approve had made a hedge or dyke which was thrown down in the night, or at any other time, but the offenders could not be found, nor would the people of the neighbouring towns cause them to be indicted, the neighbouring towns were to be distrained to repair the damage at their own costs. It was also enacted, that where common was usurped during the infancy of an heir, during the time a woman was *sub potestate viri*, while the pasture was in the hands of a tenant in dower, tenant *per legem Angliæ*, or for term of life or years, or in fee-tail, and the usurper had entered within the time of limitation in a writ of mortaucestor, the parties should not have recovery by an assise of novel disseisin, if they had no common before. This was declared by statute, because some had said, that such pastures were to be considered as appertaining to the freehold, and so that a writ of novel disseisin was a proper remedy.

These are the parts of this statute which relate to pri-

(a) Vid. ant. vol. I. 262.

(b) Ch. 46.

vate rights, excepting only ch. 32, 33, and 41, concerning property in mortmain, which have been mentioned in a former part of this reign (a).

The regulations made by this statute for the administration of criminal justice were few. It was complained, that many procured false appeals of homicide, and other felonies, to be brought by appellors who had no property, either to satisfy the king for the false appeal, or the party appealed in damages: it was therefore ordained, that when an appellee was acquitted, either at the suit of an appellor, or of the king, the justices, before whom the appeal was heard, should punish the appellor by a year's imprisonment. The appellor, nevertheless, was to restore to the party appealed, according to the discretion of the justices, the damages he had sustained by the arrest, imprisonment, and disgrace attending it, besides a fine to the king. If the appellor was not able to pay the damages, it was to be inquired (if the appellee desired it) by whose abetment or malice the appeal was commenced; and if it was found by the inquest that any one was the abettor therein, it was enacted, that he should be distrained, at the suit of the party appealed, by a judicial writ, to come before the justices, and, if he was convicted, he should be punished as the appellor. It was further ordained, contrary to the ancient practice, that in an appeal *de morte hominis*, no essoin should lie for the appellor, in whatsoever court the appeal might be (b).

Another grievance was, that sheriffs would pretend persons were indicted before them, in the tourn, of felonies and other offences, and upon that would apprehend them and confine them in prison, and so exact money for their discharge, though they were neither indicted by twelve

(a) Ch. 32, 33, 41. Vid. ant. 155, 156.

(b) Ch. 12. It seems to have been doubtful in Bracton's time, whether an essoin should be allowed to the appellee, in appeals for smaller offences; and, therefore, it is most probable it did not lie in that *de morte hominis*. Vid. ant. vol. I. 409. But in Glanville's time it lay for both parties. Vid. ant. vol. I. 196.

jurors, nor guilty of any offence. To put a check upon this abuse of jurisdiction, it was enacted, that sheriffs in their tours, and other places where they had power to inquire of offenders, by the king's precept, or *ex officio*, should cause the inquests of such malefactors to be taken by lawful men, and by twelve at the least, who should put their seals to the inquisitions; and persons found guilty by such inquisitions, were to be taken and imprisoned as heretofore. If she-
Presentments of jurors to be sealed.

riffs imprisoned others than such as were indicted by inquests of this kind, persons so imprisoned might have their writ *de imprisonmento*, as against any other person who imprisoned them without authority: the like of other bailiffs of liberties (a).

The crime of rape was once more changed into that of felony. It is provided, says the
Rape.

statute (b), that if a man ravish a woman, whether married, damsel, or other, where she did not consent, either before or after, he shall have judgment of life and member: this was to be at the suit of the party. Likewise, where a man ravishes a woman, whether *dame espouse*, a married lady, damsel, or other, with force, although she consent after, he shall have judgment as before mentioned, if attainted at the suit of the king; and in this case, says the statute, the king shall have the suit. Thus the election given by the old law to the person ravished, was wholly taken away (c).

It is said (d), there was a writ at common law, *de uxore abductâ cum bonis viri*, for the husband, though there is no mention of any such in Bracton: however, this statute provides, *de mulieribus abductis cum bonis viri*, that the king should have his suit for goods so taken; so that such offenders might now be proceeded against criminally, as well as civilly. If a woman willingly left her husband, and

(a) Ch. 13.

(b) Ch. 34.

(c) Vid. ant. vol. I. 200; and vid. ant. 125, 38.

(d) F. N. B. 121. K.

went away and continued with her adulterer, she was, upon conviction thereof, for ever to lose her action of dower, unless the husband would willingly, without any coercion of the church, be reconciled to her, and cohabit with her; in which case her right of action was restored. A person who took away a nun, though she consented, was by this act to be punished with three years imprisonment, to be fined to the king, and make a reasonable satisfaction to the house (a).

Several statutes were made for regulating the officers of courts, settling their fees, and preventing extortion and imposition upon suitors (b), similar to some regulations made by the first statute of Westminster (c). One of these aimed higher than the ministers of courts. The chancellor, says the statute (d), treasurer, justices, any of the king's counsel, clerks of the chancery, of the exchequer, of any justice, or other officer, any of the king's house, clergy or lay, shall not receive any church, or advowson of a church, land, or tenement, in fee, neither by gift or purchase, nor to farm, *ne a champert* (that is, to have a part, or *campi partitio*, since called *champerty*), nor otherwise, so long as the thing is in suit before them, or any other of the king's officers. If any did contrary hereto, both purchaser and seller was to be punished at the king's pleasure. The *dividing* part of the thing in question is a bribe mentioned in the first statute of Westminster (e); but it is first spoken of here under the name of *champerty*.

After the numerous provisions made by this statute for the amendment of the law, it concludes with a sort of anxiety lest any thing should be left not provided for; *super verò statutis in defectum legis, et ad remedia editis ne diutius querentes, cum ad curiam venerint, recedant de remedio desperati, habeant brevia sua IN SUO CASU PROVISA* (f); referring, as it should seem, to the 24th chapter (g), which

(a) Ch. 34.

(b) Ch. 42. 44.

(c) Viz. ch. 26, 27, 28. 30. Vid. ant. 127.

(d) Ch. 49.

(e) Viz. ch.

25. Vid. ant. 126.

(f) Ch. 50.

(g) Vid. ant. 202.

had given the authority to clerks in the chancery to frame writs *in consimili casu*.

The next act of this parliament is the statute of Winchester; containing some provisions for enforcing the ancient police, and ordaining some new regulations. The act states, that robberies, murders, burnings, and thefts, increased more than ever; and that this was to be attributed to want of a due administration of the subsisting law. It is said to have been very much owing to the negligence or wilfulness of jurors, who, being connected either with felons or receivers, could not be brought to indict them: again, jurors were not, as they should be, of the neighbourhood where the offence was committed; nor was there any penalty upon jurors guilty of such concealments and neglects. To remedy this, says the statute, the king hath established a penalty for such concealment; so that, if they disregarded their oath, they might be in some fear of the penalty. But there being no specific penalty named, it should seem, it must be ascertained by the discretion of the court. It further directed, that *cries*, that is, the *hutesium et clamor*, should be solemnly made in all counties, hundreds, markets, fairs, and other places where there was great resort of people, so that none might excuse himself for ignorance: by these means the country would be so well kept, that none could escape for want of fresh suit from town to town, and from country to country (a).

Moreover, when it was necessary, inquests were to be made in towns by the lord of the town, and afterwards in the hundred, in franchises, and in the county, and sometimes in two, three, or four counties, in case of felonies committed in the marches of shires, so that the offenders might be attainted. If the country would not answer for

(a) Ch. 1.

the bodies of such offenders, the following penalty was ordained: the people dwelling in the country were to be answerable for the robberies done, and the damages sustained; so that the whole hundred, where the robbery was committed, with the franchises therein, should be answerable for robberies; and if they were done in the division of two hundreds, *both* the hundreds and the franchises within them were to be answerable. The hundred was to have only forty days allowed them to agree for the damages, or answer for the bodies of the robbers (*a*). This policy of compelling a certain district to make good secret mischiefs committed therein, had been pursued in the former statute of this year against those who broke down hedges, and committed other acts of mischief in the night (*b*). Upon this provision of the statute of Winchester an action has been grounded, by which a person robbed may recover against the hundred the loss he has sustained. This has since been put under certain restrictions, by several statutes (*c*).

By way of prevention it was enacted, that in great walled towns, the gates should be closed from sun-setting to sun-rising; that no one should lodge in the suburbs, or in any place out of the town, from nine o'clock till day, unless his host would answer for him. Every week, or at least every fifteen days, the bailiffs of towns were to make inquiry of persons lodged in the suburbs and extremities of the town; and if they found any who had lodged strangers or suspicious persons against the peace (for so it was called), the bailiffs were to do right therein. Watches were to be kept, as had been used in former times, that is, from the day of the Ascension to the day of St. Michael; in every city, six men at each gate; in every borough, twelve men; in every town, six or four, according to the number of inhabitants; and these were to watch continually from sun-setting to sun-rising. If any stranger passed by, the watch

(*a*) Ch. 2.

(*b*) West. 2, ch. 46. Vid. ant. 209.

(*c*) Stat. Eliz. &c.

were to arrest him till morning; and if any suspicion appeared, he was to be delivered to the sheriff, who was to keep him safe till he was delivered in due manner. If any one resisted the arrest, hue and cry was to be raised; and those who kept watch in the town were to follow the hue and cry from town to town till the offender was taken. It was enacted that no one should be punished for arresting such strangers (*a*).

It was directed, that highways should be cleared from woods, bushes, and dykes, to prevent any one from lurking there: this was to be for two hundred feet on each side of the road. However, ashes and large trees were not to be felled to make such clearance. If robberies were committed through the owners' refusing or neglecting to clear the roads in the above manner, they were to be answerable for the felonies; and if murder was done, they were to make fine at the king's suit. If the owner could not remove trees and bushes himself, the country were to aid him: the same of the king's demesnes and forests. Moreover, if a park was made by the side of a highway, it was to be at the distance of two hundred feet; or a wall, dyke, or hedge, was to be made, that offenders might not come out to commit offences and then escape back again (*b*). It was further directed, that every man should have harness and arms, according to the old assise of arms, with some variations directed by this statute (*c*).

The next act of this parliament is the *statute of merchants*; which having been mentioned before, we proceed to the statute of *Circumspectè agatis*. This is so called, from the initial words of it; ^{Statute of} *Circumspectè agatis*. though it is rather in the form of a writ, from the king to his justices, concerning the bishop of Norwich and his clergy, beginning, *Rex talibus iudicibus salutem, Circumspectè agatis, &c.* without any mention of the concurrence of the parliament (*d*). However, it has always been

(*a*) Ch. 4.(*b*) Ch. 5.(*c*) Ch. 6.(*d*) 2 Inst. 487.

considered as a statute; is referred to by a subsequent parliament as such; and, after what has been before observed on the form of our old statutes (*a*), the reader may not, perhaps, consider such deficiency of parties or wording as very singular or material.

We have no authentic account of the disputes between the temporal and spiritual courts during this reign (*b*); but it may be collected from the present statute, that some points were thought not to be sufficiently adjusted. This act was designed to ascertain the boundaries of ecclesiastical jurisdiction in some particulars (*c*); for which purpose it directs, that the bishop of Norwich and his clergy (a contest with whom might, probably, be the immediate occasion of this act) should not be punished, if they held plea of such things as were *merè spiritualia*: as for instance, of penance enjoined by prelates *pro mortali peccato*, as fornication, adultery, and the like; in which cases sometimes a corporal, sometimes a pecuniary pain was inflicted, especially if the person offending therein was a freeman: also, if prelates punished any one for having a church-yard uninclosed, a church uncovered, or not decently ornamented; in which cases none but pecuniary penalties could be imposed. So if a rector demanded parochial oblations and tythes due and accustomed; or claimed against another rector tythes, whether large or small, so as they did not amount to the fourth (*d*) part of the value of the church: again, if a rector demanded a mortuary in places where it was customary; so if a prelate of any church, or a patron, should demand from the rector a pension as due to him; it was ordained, that all such demands should be made in the ecclesi-

(*a*) Vid. ant. vol. I. 215; and ant. 153, in the note.

(*b*) Some statutes and other instruments which are assigned to this reign by lord Coke, are to be found among the *statuta incerti temporis*, and will be mentioned in the next reign.

(*c*) For such cases as were allowed to belong to the spiritual jurisdiction, vid. ant. vol. I. 453, &c. and ant. 79.

(*d*) In Bracton's time it was limited at a sixth. Vid. ant. vol. I. 453.

astical court. As to the laying of violent hands upon a clerk, and causes of defamation, it was, says the statute, heretofore allowed, that suits of that sort should be heard in the court christian, if money was not demanded, and they went merely *ad correctionem peccati*: the like of suits *de fidei lacione*. In all the above-mentioned cases, says the act, the ecclesiastical judge had jurisdiction, *regiâ prohibitionem non obstante*.

Such is the adjustment made by the statute of *Circumspectè agatis*. In the twenty-fourth year of this king, there is a statute upon the same subject of ecclesiastical jurisdiction, which may be more properly mentioned here, than in its chronological order: this is called, *the statute of the writ of (a) consultation*. It seems the writ of prohibition had been resorted to very frequently, in cases where no remedy could be had in the king's court by writ out of chancery; so that persons who could obtain no remedy in the temporal courts, were deprived also of such as might be procured in the spiritual. A representation on this subject was made to the king; and it was now ordained, that, in future, when the ecclesiastical judge was stopped by a prohibition, the chancellor, or the king's chief justice for the time being, upon sight of the libel in such case, at the instance of the complainant, if he saw there was no remedy in such case by a writ out of chancery, but that it belonged to the ecclesiastical court to determine it, should write to the judges before whom the cause depended, *quòd in causâ procedant, non obstante prohibitionem regiâ sibi priùs inde directâ, &c.* Thus was it designed to give protection and energy to the ecclesiastical court when it exercised a jurisdiction supplemental, as it were, to the temporal courts, in correcting those excesses for which the poverty of the common law had not yet provided any redress.

(a) Stat. 24 Ed. I. of the writ of *consultation*. Vid. ant. vol. I. 456.

A statute for regulating the police of the city of London, entitled *statuta civitatis Londini*; and another, entitled, *forma concessionis et exemplificationis Chartarum*, confirming the Charters; make the remainder of the statutes enacted in the famous parliament of Westminster, in the thirteenth year of this king.

CHAP. XI.

EDWARD I.

*Statute of Quo Warranto—Statute of Quia Emptores—
 Modus levandi Fines—Statute de Finibus levatis—
 Writ of Ad Quod Damnum—Statute of Articuli super
 Chartas—Court of the Steward and Marshal—Writ
 of Conspiracy—Of the different Courts—An Action of
 Debt in the Steward's Court—Common Writ of Debt
 —Of Detinue—Of Covenant—Of Trespass—The
 Criminal Law—The King and Government—Statutes
 and Records—Fleta—Britton—Hengham—Thornton
 —John de Athona—Miscellaneous Facts.*

PASSING over the *statutum Exoniæ*, 14 Ed. I. concerning inquisitions taken before coroners, and some *articuli* upon that statute; as also the *ordinatio pro statu Hiberniæ*, 17 Ed. I. mentioned in the former part of this reign; we come to the eighteenth year of this king, when a parliament was holden, commonly called Westminster the third. This parliament produced four very important statutes. The first is the statute *quia emptores terrarum*; two statutes of *quo warranto*; and one intitled, *modus levandi fines*.

To begin with the statute of *quo warranto*, Statute of *quo* 18 Ed. I. stat. 2. Before we speak of this *warranto*. statute, it will be necessary to take notice of one on the same subject, and bearing the same title, enacted in the sixth year of the king. This statute was for a long time considered as made in the thirtieth year of this reign; but

that is now agreed to have been only a publication of it under the great seal; and indeed it is there recited as having passed in the sixth, to which place we now restore it.

We have before seen the nature of the proceeding by *quo warranto*, or *quo jure* (a). This writ was brought forward into more notice by the frequent use which the present king caused to be made of it, and by these two statutes for regulating the process, and proceeding therein. The king, in execution of the plan of reducing the nobles under his sovereign authority, had begun to make strict inquiry into the titles by which franchises and liberties were claimed. Some of these he had resumed by judgment of his courts of law; and many prelates, earls, barons, and others, had days fixed when they were to make out their titles, and the whole would be examined: but to quiet the minds of men till this matter was investigated, it was among other things enacted in the sixth year of the king, that a writ should issue, commanding the sheriff to permit all persons to continue in the enjoyment of such liberties as they had hitherto possessed, till the king's coming (that is, the coming of the king's court) into that county, or the coming of the justices itinerant *ad omnia placita*, or till the king gave some further direction therein. The form of another writ was prescribed, which directed the sheriff to make proclamation for all persons claiming any liberties by royal charter, or otherwise, to come before the justices *ad primam assisam, cum in partes illas venerint*, to shew *quomodo hujusmodi libertates habere clamant, et QUO WARRANTO, &c.*

Thus, instead of a special writ, which called upon a particular person to set forth his title, and which was a sufficiently severe investigation; all persons were by one general proclamation put to defend their rights, and

(a) Vid. ant. vol. I. 426.

shew their titles : war was at once declared with all the liberties and franchises in the kingdom, without stating any specific ground of complaint. The statute, however, that was made to maintain the proceeding which was hereby set on foot, declares, that should any object that they were not bound to answer without an original writ ; yet, if it appeared they had usurped any liberty upon the king or his ancestors, they should answer immediately without any writ, and abide the judgment of the court : but if they said their ancestor died seised of the liberty, then they were so far distinguished from the foregoing description of persons, that the king was to award an original writ out of chancery, summoning the party to appear *in proximo adventu nostro, vel coram justitiariis, &c. cum in partes, &c. ostensurus QUO WARRANTO tenet visum franciplegii in manerio de N. &c.* upon which there was to be the same process as in the circuit of the justices. This was, in truth, nothing more than the old common law writ and proceeding.

After this statute, great numbers of writs of *quo warranto* were brought against prelates and others of the clergy, and against temporal lords and others, for their liberties, franchises, and privileges of various kinds. These rigorous proceedings were borne with great impatience. While this unpopular course was taking by the king's officers, complaint was made thereof in the parliament of the eighteenth year of this king ; in consequence of which there passed the *statutum de quo warranto NOVUM*, as it is called in respect of that made in the sixth year at Gloucester. Forasmuch, says this act, as writs of *quo warranto*, and judgments to be given thereon, were greatly delayed, because the justices in giving judgment were not certified of the king's pleasure therein (it not being usual, it seems, for judgment to be given till the justices were certified of the king's pleasure by a writ *de libertatibus allocandis*, founded probably upon the statute made at

Gloucester); he therefore, of his special grace, and for the affection he bore to his prelates, earls, barons, and others of his realm, granted as follows: That all persons who could make out by an inquest of the country, or otherwise, that they and their ancestors, or predecessors, had enjoyed and used any liberties, whereof they had been impleaded by any of those writs, *ante tempus regis Richardi, consanguinei sui, aut toto tempore suo, et hucusque*, and had so continued till then, without misusing them, should be adjourned to a future day before the same justices, within which time they might attend the king with the record of the justices, signed with their seal, and also the return; and the king would, by his letters patent, confirm their titles. It was also enacted, that those who could not prove the seisin of their ancestors or predecessors in the above way, should be dealt with in the regular course of law (a): to which the king added this gracious clause, that where judgments had been given against certain persons within a particular time, he would grant them the benefit of the above provision.

To spare the expences attending such a proceeding as this, where the contest was with the crown, it was ordained, that, in future, pleas of *quo warranto* should be pleaded and determined in the *itineria* of the justices; and that all pleas then depending should be adjourned into the counties, till the coming of the justices (b). This is followed by another statute of *quo warranto*, making and confirming a restitution to such as had lost their liberties by judgment, and securing others who came within the grace held out by a clause in the former act. Thus was this terrible inquiry by *quo warranto* for a time let loose upon the great men of the nation, till the king at length consented to suspend it, and wholly to abolish the more oppressive parts of that proceeding.

(a) Sect. 1.

(b) Sect. 1.

The statute *Quia emptores* is entitled in the parliament roll, from the subject of it, *statutum regis de terris vendendis et emendis*. We have before seen the restraint imposed on the alienation of land by *Magna Charta* (a), with the practice that still subsisted during the last reign (b), and which gradually led to a violation of that chapter in the Great Charter. As the consequences of this practice were more felt, complaint thereof was made in parliament, and the following statute was passed in order to put this matter upon a new footing. Forasmuch, says the act, as purchasers of lands and tenements of the fees of great men, and other lords, have entered into their fees, to the prejudice of the lords; these purchasers having bought the lands and tenements from the freeholders of such great men to hold of their feoffors, and not of the chief lords of the fees; so that the chief lords have lost their escheats, marriages, and wardships of such lands and tenements, which was a grievance to the great landholders of the kingdom, who thought themselves in a manner disherited by such defalcations in their seigniories: for these reasons it was, at their instance, ordained, that, in future, it should be lawful for every freeman to sell, at his pleasure, his land or tenement, or part thereof, so that the feoffee should hold the land or tenement of the chief lord by the same services and customs by which the feoffor before held it (c). Thus every freeholder, instead of the partial permission he before had under *Magna Charta*, was at liberty to alien *all* his land, provided he made a reservation of the services, not to himself, but to the chief lord; so that the practice of creating new seigniories now ceased, and every tenancy in the kingdom was ever after to continue a part of the same fee or manor to which it then belonged; for, if no new reservation of services could be made, no new manor could be created.

(a) Vid. ant. vol. I. 239. (b) Vid. ant. vol. I. 293. (c) Ch. 1.

This act has two other chapters: one of them is only explanatory of the former, and directs, that where a freeholder sold part only of his lands or tenements, the feoffee should be immediately charged with the services due to the chief lord, in proportion to the quantity of the land or tenement; and the chief lord was to receive it at the hands of the feoffee (a). It was added (b) by way of caution, that this act should not be construed as authorizing the purchase of lands or tenements in mortmain (c); and that it should relate only to land held *in fædo simpliciter*; or, as it has since been called, *fee simple*.

Modus levandi fines. The fourth act passed in this parliament is the *modus levandi fines*; stating the course to be observed in *levying a fine*; for so this transaction was now usually called. The little information to be found, before this statute, on the subject of fines, and the manner of transacting them in court, is derived from Glanville (d). What is said by Bracton on this ancient security, is confined to the nature of claim, and the consequence of *non-claim* (e).

The passing of fines hereafter rested upon the directions given by this act. It directs, that when the original writ was delivered in presence of the parties, before the justices, a *countor* should say thus: *Sire justice, congé d'accorder* (this was praying the *licentia concordandi*, on which a fine was due to the king); then the justice was to say, *que donera, sire Robert?* naming one of the parties. When they had agreed upon the sum of money to be given to the king, then the justice was to say, *Criez la peez* (that is, rehearse the concord); upon which the countor was to say, "Inasmuch as peace is licensed thus unto you; William and Alice his wife, who are here present, do acknowledge the manor of B. with its appurtenances contained in

(a) Ch. 2.

(b) Ch. 3.

(c) Vid. ant. 154.

(d) Vid. ant. vol. I, 148.

(e) Ibid. 477.

“ the writ, to be the right of Robert, *come cell' que il ad*
 “ *de lour done*, as that which he hath of their gift, to have
 “ and to hold to him and his heirs, of William and Alice,
 “ and the heirs of Alice, as in demesnes, rents, seigniories,
 “ courts, pleas, purchases, wards, marriages, reliefs, es-
 “ cheats, mills, advowsons of churches, and other fran-
 “ chises and free customs belonging to the said manor,
 “ paying to Thomas and John, and their heirs, as chief
 “ lords of the fee, certain services and customs due for all
 “ services.”

This was the method of proceeding to be observed in future, and fines were henceforward more uniform in their practice than they had been at the common law. It was declared to be the usage of the common law not to suffer a final accord to be levied in the king's court without a writ original; which was to be returnable before four justices in the bench or eyre, and not elsewhere: it was also to be in presence of the parties named in the writ, who were to be of full age, of good memory, and out of prison; and if a woman *covert de baron* was one of the parties, she was first to be examined by the four justices above mentioned. The reason of such solemnity, says the statute, is, because a fine is so high a bar, of such great force, and of so strong a nature, that it concludes not only parties and privies thereto, and their heirs, but all other people of the world being of full age, out of prison, of sane memory, and within the four seas at the time of the fine levied, if they make not the claim of their action on the foot (a) of the fine, within a year and a day. In these declarations about *non-claim*, the statute seems to be framed on the principles of the common law (b).

In the 27th year of this king, there was another statute upon this subject, entitled, *De finibus levatis*, *statutum de finibus levatis*, by which it was intended to

(a) *Sur la pie* are the words in the original: some copies read *pur la pays*.

(b) Vid. ant. vol. I. 477.

abolish a practice which had somewhat invalidated fines, and rendered them a less valuable security than they had before been considered. The statute says, that *fines* levied in the king's court ought to make, and did make an end of all matters; and were so called, because, next to the duel and great assise, *ultimum locum, et FINALEM teneant, et perpetuum*: but that, in the late turbulent reign of Henry III. and since, the parties to a fine, and their heirs, contrary to ancient law and practice, had been admitted to annul and defeat such fine, by alleging, that before the fine was levied, and at the levying thereof, and since, the demandants, or plaintiffs, or their ancestors, were always seised of the lands contained in the fine, or of some parcel thereof; which fact used to be tried by a jury, and, if found to be true, was considered as annulling the fine. Thus where a fine had been levied to a person already in possession, merely to confirm and establish his title, it was rendered entirely ineffective. To put an end to this practice, it was ordained, that such exceptions, answers, or inquiries of the country should not, in future, be admitted, contrary to such acknowledgments and fines. The statute further directs, that such notes and fines, as were in future levied in the king's court, should be read openly and solemnly, and that in the mean time all pleas should cease; and this was to be on certain days of the week, according to the discretion of the justices^(a). Thus was the doctrine of fines settled in the way it continued for many years after.

To return to the 18th year of this king, and go on with the remaining statutes, in the order in which they were passed. In the 20th year, there were six statutes. The first is called the statute of vouchers; the next, of waste; the third, *de defensione juris*: these are followed by three upon the subject of the coin. The first three were made for improving some provisions of stat. Westm. 1. Thus

(a) Ch. 1.

the statute of vouchers extends the privilege given to a demandant by the 1st Westm. (a) to counterplead a warranty, if the warrantor was absent, to cases where he was present also. Vouching to warranty had been much abused by litigious men, who would vouch some indigent person; and if such vouchee entered into the warranty, there could be no counterpleading his title before this act, but the duel might be waged, and the demandant obliged to rest the determination of the question upon that decision: all which was prevented in future by this act.

The statute of waste is an authoritative decision in parliament of a point arising in a cause then pending in the bench, upon which occasion the parliament declared how the law should be held in future. The case in the bench was of an action of waste, where the plaintiff died before judgment, and his heir brought a fresh action against the defendant; to which the defendant made answer by saying, he ought not to answer for waste done before the inheritance descended on the plaintiff, and therefore demanded judgment of the action. Upon this some of the justices were of opinion, that the writ of waste, being a writ *de transgressione*, none should obtain redress and recompence thereby, but he to whom, and in whose time, the trespass was done: others, and many of the king's counsel, were of a contrary opinion. To settle this doubt, it was now ordained by parliament, that an heir (in whose ward soever he might be, and whether within age or not) should have his recovery by a writ of waste in the above cases, and those which were similar, as well of waste in the time of his ancestor, as since the descent upon himself; and should recover the place wasted, and damages as ordained by the 1st Westm. 2 (b). The justices were directed to proceed in that manner in the cause then before them, and in all others. This statute is one instance of the re-

(a) Viz. ch. 40. Vn. ant. 120. (b) Viz. ch. 14. Vid. ant. 180,

course which the courts used to have to the parliament for deciding doubts arising in suits before them.

It was found that abuses followed from the liberty given by stat. Westm. 2 (a). of receiving persons before judgment to defend the inheritance, where actions were brought against tenants *per legem Angliæ*, in tail, in dower, for life or years. To correct these, it was ordained by the statute *de defensione juris*, that the person so received should find such sufficient security as the court should think fit, to satisfy the demandant of the value of the land, from the day he was received till the final judgment. If the demandant recovered, he was to be amerced; and if he had not wherewithal to pay, he was to be committed to prison at the king's pleasure; though he was to go quit, if he could make his title to have been as he stated it when he was received.

Of the three provisions about the coin, the first is entitled, *statutum de monetâ*; the second, *statutum de monetâ parvum*. These were against the importation of clipped and counterfeit money. This crime, by the latter act, was punished, for the first offence, with forfeiture of the money, as well in merchants negotiating as importing it; for the second offence, they were, besides, to forfeit all other goods that they had about them; for the third offence to be at the king's mercy for their bodies and all their goods. The next provision is entitled, *articuli de monetâ*, and is upon the same subject of importing clipped money, which, it seems, was the most common offence against the coin in these days. To bring all the acts upon this article into one view, we shall mention another public instrument in the 27th year of this king, entitled, *statutum de falso monetâ*. It was therein ordained, that persons importing certain coins, called *pillards* and *crokards*, should forfeit their lives and goods, and every

(a) Viz. ch. 3. Vid. ant. 1st.

thing that they could forfeit. It was likewise directed, that officers should be appointed at the sea-ports to search all persons landing there, to see if they had any unlawful money.

Thus far of the statutes in the 20th year of this king. In the 21st there are two: one entitled, *de iis qui ponendi sunt in assisis* (of which we have before spoken) (*a*); the other, *de malefactoribus in parcis*. We have before seen, with what solicitude the great lords had pressed for laws to punish those who invaded the places allotted for their rural amusement or accommodation (*b*). The act last mentioned was for the punishment of persons trespassing in forests, chases, parks, and warrens; and it ordains, that such persons, if they fled, or defended themselves against the warrener, or parker, and were killed, the persons attempting to take them should not lose life or limb, or suffer any other punishment for so doing: but foresters and others were by the same act cautioned that, under pretence of the like trespassing, they did not molest or hurt any one quietly passing, for that in such cases execution should be done as before.

In the 24th year is the statute of the writ of *consultation* before mentioned (*c*): in the 25th, the *confirmationes Chartarum*, and the excommunication of those who offended against the Charters; both which have been considered before (*d*). Then comes the statute *de finibus levatis*, 27 Ed. I. the first chapter of which, and that which gives the title to the statute, has been already noticed; as has the third and fourth (*e*) concerning justices of gaol-delivery and of *nisi prius*. Chap. 2. only remains to be mentioned, which puts sheriffs under some check in their accounts of issues, fines, and the like. It ordains, that a baron and a clerk of the exchequer shall go once a-year

(*a*) V

id. ant. 184.

(*b*) Vid. ant. vol. I. 266.

(*c*) Vid. ant. 217.

(*d*) Vid. ant. 101. 103.

(*e*) Vid. ant. 103. 225. 173.

into the country, to enroll the names of such as had paid, and hear and determine complaints against sheriffs. The other statutes in this year are, one entitled, *ordinatio de libertatibus perquirendis*; and another, which has just been mentioned, *de falso monetâ*.

The *ordinatio de libertatibus perquirendis* (a) was so entitled, because it directs some course to be taken for facilitating the transactions of men in several instances where the interest of the crown was concerned. First, it was ordained, that persons who would purchase a new park, and religious men who would amortise lands or tenements, should have writs out of the chancery to inquire upon the points usual in such cases; and it was directed, that all such inquisitions, if of lands or tenements worth more than twenty shillings *per ann.* should be sent to the exchequer, and there (if the inquests had passed in favour of the purchasers) the parties were to pay their fine for the amortisement, or for the emparking; afterwards the inquests were to be sent to the chancellor, or his deputy (b), who should accept a reasonable fine, according to the quantity of the thing to be conveyed, and then make livery thereof (c). The same course was to be taken by those who would purchase lands or tenements held of the king in chief (d). The writ here *Writ of ad quod damnum* alluded to was that of *ad quod damnum*, as it has since been called, which has not been mentioned before, notwithstanding it was probably a writ at common law. It was directed to the escheator, to inquire whether it would be *to the damage of the king*, or of others, should he permit such a one to alien in mortmain, or otherwise sell his land. After this statute, when a person wanted a licence for one or the other, he used to sue to the king to have this writ out of chancery; and upon the return of it,

(a) Stat. 27 Ed. I. st. 2.

(b) *Lieu-tenant*.

(c) Sect. 1.

(d) Sect. 2.

if favourable, the licence used to be granted on the terms mentioned in the statute (a).

As a check upon the abuse of this act, it was ordained by statute 34 Ed. I. st. 3. touching the king's grants to be made upon inquests returned into the chancery concerning lands to be amortised (which plainly means the writ of *ad quod damnum*), that where there were mesne lords, nothing should be done, except the religious persons could shew to the king the assent of such mesne lords, in letters patent under their seals; and that nothing should pass where the donor did not reserve somewhat to himself (b), or there was no original writ, or the writ did not make mention of all the circumstances required by the new ordinance of the king, meaning the before-mentioned statute.

It was further ordained (c), that people living beyond sea, and having lands, tenements, or rents, in England, if they would purchase writs of protection, or make general attornies, should be sent to the exchequer, and there pay their fine for the same; also, persons that could not travel, or who lived at a great distance, and were plaintiffs or defendants, were to have a writ out of chancery to some sufficient man, who should be received as their attorney when needful (d).

In the 28th year we find three statutes: one called the statute of *wards and relief*; the next, *for persons appealed*; the third, the famous statute of *articuli super Chartas*. The first of these seems to be nothing more than a declaration of the common law, in several points relative to ward and relief. In the first place it declares, that where a relief was given, there wardship was incident, and the

(a) F. N. B. 509.

(b) This provision seems to take away the power of making any more gifts *in puram et perpetuam eleemosynam*. Indeed, this seems to have been before accomplished by the statute *Quia emptores*; which, by requiring the accustomed services to be reserved to the chief lord, takes away the liberty of making a gift with an exemption from service.

(c) Stat. 27 Ed. I. st. 3.

(d) Vid. ant. vol. I. 278.

contrary; that such as held by *serjeanty* to go with the king in his host, were to pay ward and marriage, as incident thereto; that those who held by *petit serjeanty*, as to bear shield or spear in the king's host (which, however, does not agree with Bracton's description of *petit serjeanty*) (a), should pay neither ward, marriage, nor relief; that a *free sokeman* was not to give ward nor relief, but was to double his rent after his ancestor's death, according to what he had been used to pay to his lord; and was not to be immeasurably burthened. Some declarations were made as to the nature of wards. It declares, that there were two kinds of writs to recover wards: one, where the lands were holden by *knight's service*; the other, where lands were holden in *socage*; that the ward of the former belonged to the lord till the heir was twenty-one years old, and also the marriage; which was to be, as ordained by the Great Charter, without disparagement; but that the ward of an heir in *socage*, if the land descended *ex parte matris*, belonged to the next friend on the father's side, and so *vice versâ* (b).

It further declares, that there were three ways in which a writ to recover ward might be brought: one, where the ward both of the land and the heir was demanded; this was where a tenant in knight's service died, and the chief lord demanded the heir and land in ward. Another way, says the statute, is, where a man is infeoffed of a piece of land by one, and, after that, of another piece by another man: here the second lord could not have the writ, because the ward belonged to the lord who made the first feoffment (c). The third way was, when a person possessed the land in ward, but had not the heir, then a writ would lie to demand the heir only (d). These are the declara-

(a) Vid. ant. vol. I. 278.

(b) For the nature of *ward* and *marriage* at common law, vid. ant. vol. I. 284.

(c) Vid. ant. vol. I. 285. and ant. 208.

(d) Of the writ of ward, vid. ant. 208.

tions made by this statute. The statute for persons appealed has been mentioned before (a).

The statute of *Articuli super Chartas* was made, as has been before said, to supply certain defects in the Charters; and therefore Statute of *Articuli super Chartas*. some of its regulations are upon the same subjects with many of that famous instrument. These we shall divide into such as relate to the king, or were of a miscellaneous nature, and such as related to the administration of justice, civil or criminal.

Of the former kind, the first that presents itself is a string of regulations concerning that heavy grievance on the subject, purveyance; the king's household-officers taking provisions either without paying any thing for them, or paying only what was very much under their value. It was now ordained, that none should take such prises (for so they were called) but only the king's takers and purveyors for his house; they were to take nothing but for the use of his house; and all meat and drink, and the like, they were to pay or make agreement for. They were also to have the king's warrant, containing what things they should have authority to take; and this they were to shew before they took any thing. They were to take only what was sufficient for the king, his household, and children, and for none who were upon wages, or any other; and they were to account in the king's *hostell*, or in the wardrobe, for all things taken. If any took things contrary to the above restrictions, complaint was to be made to the steward and treasurer of the king's *hostell*, and the truth was to be inquired of; and if any was attainted of breaking the above regulations, he was to make agreement with the party, be put out of the king's service, and remain in prison at the king's pleasure. If any one took prises without a warrant, he was to be arrested and put in prison; and if attainted thereof, he was to be treated as a felon,

(a) Vid. ant. 174.

provided the goods required it, that is, if they amounted to more than twelve-pence.

This was the order to be observed in taking meat, drink, and other small things; but as to prises made in fairs, in towns, and in ports, for the king's great wardrobe, the takers were to have the common warrant under the great seal, as before. What they took was to be under a sort of check and controul from the mayor, bailiff, or keeper of the fair, and accounted for to the master of the wardrobe (*a*).

It was ordained that distresses for the king's debts should not be made upon beasts of the plough, so long as any other could be found, under pain of the penalty inflicted by the statute *de districtione scaccarii*, 51 Hen. III. Too great distresses were not to be made for the king's debts, nor were they to be driven too far; which also had been provided for by the said former act (*b*). Further, if a debtor could find able and sufficient sureties until some day before the day limited for the sheriff, within which a man might purchase a remedy to agree for the demand, the distress was to be in the mean time released (*c*). Upon this clause a writ was framed, commanding the sheriff to accept sureties; which if he refused, there would issue process of attachment against him (*d*).

Some further provisions were made for regulating the king's revenues. To redress waste done in the king's wards by escheators and sub-escheators, a writ of waste was given, as in other cases of waste (*e*). And where land had been seized into the king's hands by escheators or sheriffs, and the profits taken, and it was afterwards removed out of the king's hands, because he had no right to seize it; the issues in such case were to be fully restored to the person to whom the land ought to remain, for the damage sustained (*f*). Concerning the *removing* the king's

(*a*) Ch. 2.

(*b*) Vid. ant. 61.

(*c*) Ch. 12.

(*d*) 2 Inst. 565.

(*e*) Ch. 18.

(*f*) Ch. 19.

hands by a writ called an *amoveas manum*, more will be said in the next year, when a statute was made on that subject.

The principal officers for the preservation of the peace of the county, or for the execution of justice, were, by virtue of the king's writ, chosen by all the freeholders of the county, in open county-court. It was in confirmation of this ancient usage, which perhaps in this instance had been violated, that it was now declared by parliament, that the king had granted to his people, that they should, if they pleased, have election of their sheriff in every county, where the shrievalty was not of fee (*a*). By another chapter (*b*) of this statute it was ordained, that as the king had granted the election of sheriffs to the people of the county, they should chuse such persons as would not overcharge them, or put officers in authority for rewards or bribes, nor lodge too frequently in one place, nor upon poor persons or men of religion. To avoid one great occasion of the oppressions exercised by sheriffs, it was ordained (*c*), that the bailiwicks and hundreds of the king, or of other great lords, should not be lett to farm, as they commonly were, at over-great sums, which gave occasion to burthen the people, that the renters might be enabled to pay their fermes. This was a great evil; and to prevent the extortions to which it led, several acts were made in the subsequent times to correct, and at length to abolish this practice of letting to farm the offices of justice (*d*).

The remainder of this statute relates either to the administration of civil justice, or to the criminal law. To begin with the former: We find a provision made for ascertaining the bounds of jurisdiction in the court of the steward and marshal; a court, of which nothing has hitherto been said, and the earliest mention of which is in this statute. This seems, like several

Court of the
steward and
marshal.

(*a*) Ch. 8.

(*b*) Ch. 13.

(*c*) Ch. 14.

(*d*) St. 4 Ed. III. c. 15. & 4 Hen. IV. c. 5.

others, to have been an emanation from the great court, called the *aula regis*, so often mentioned; and to have been designed for the sole purpose of determining questions between persons attending the king in his household. Of the nature of this court, and the manner of conducting suits there, more will be said in the subsequent part of this reign: for the present, we shall proceed to examine the statute now made for ascertaining its jurisdiction. It was ordained (*a*), that the stewards and marshals (for the statute speaks in the plural number) should not hold plea of freehold, nor of debt or covenant, nor of any contract made between common persons, but only of trespass done within the *hostell*, and other trespasses done within the verge; and of contracts and covenants that any one of the king's *hostell* should have made with another of the same *hostell*, and in the same *hostell*, and no where else. They were to hold no plea of trespass but that which should be attached by them before the king departed from the verge where the trespass was committed; and they were to hold plea thereof speedily, from day to day, so that it might be pleaded and determined before the king departed out of the limits of the same verge where the trespass was done; and if it could not be determined within the limits of the same verge, then the plea before the steward was to cease, and the plaintiffs were to resort to the common law. It was enacted, that the steward should not in future take acknowledgments of debts, or other things, but of persons of the *hostell*, as aforesaid; nor hold any other plea, by obligation *made at the distress* of the stewards and marshals (the nature of which *distresses*, to give jurisdiction to this court, will be considered hereafter); and if the stewards or marshals did any thing contrary to this act, it was to be holden for void.

The steward and marshal had a criminal as well as civil judicature; and this, like the former, was confined to the verge; but it happened that many felonies went unpunished,

(*a*) Ch. 3.

because the coroners of the county had not authority to inquire of felonies done within the verge, but only the coroner of the king's house; and as this never continued long in one place, there sometimes could be no regular trial, no time to put the felon in exigent, and proceed to outlawry. Again, none of the matters cognisable in this court could be presented in the eyre. These failures in the administration of justice tended greatly to obstruct the well-ordering of the police. To correct these in future, it was ordained, that from thenceforth, in cases of the death of a man, it should be commanded to the coroner of the county, that he, together with the coroner of the king's house, should do as belonged to his office, and make enrollment: and those matters which could not be determined before the steward, as where the felon could not be attached, and the like, should be remitted to the common law; so that exigents, outlawries, and presentments should be made thereon at the eyre by the coroner of the county, in the same manner as presentments of felonies done out of the verge: however, there was not, on this account, to be any neglect in making fresh attachments against felons by the officers in the verge.

After this provision was made to limit the court of the steward and marshal, it was moreover ordained, that no common plea should thenceforth be held in the exchequer contrary to the form of the Great Charter^(a). From whence it seems, though the words *curia nostra* in the Charter were construed by the legislature to mean the exchequer, as well as the court properly so called, conformably with the account we have before given of this court^(b), yet, that suits between party and party were still entertained there. This had been complained of, and the legislature endeavoured to remedy it in the statute of *Rutland*, 10 Ed. I. where the king says, that whereas certain pleas have been hitherto

(a) Ch. 4.

(b) Vid. ant. vol. I. 244.

held in the exchequer, which did not concern us or our ministers of the exchequer; by which means our pleas, and the business of the people *coram nobis*, are improperly prorogued and impeded; therefore we are willing, and ordain, that no plea be held or pleaded in the exchequer aforesaid, unless it specially concerns *nos, vel ministros nostros prædictos*; which statute was thereby directed to be enrolled in the exchequer, for the government of the barons. Thus did the court of exchequer by these two statutes seem to be completely deprived of all cognizance, except in the suits of the king, and his ministers or officers; but we shall see hereafter, that this last branch of their jurisdiction was made use of, in subsequent times, to introduce all sorts of causes, under the pretence that they affected the king's ministers or officers.

The following chapter says, that, on the other hand, the king willed, that the chancellor, and the justices *de soen banc*, should follow him; so that he might have at all times near him some sages of the law, who were able duly to order the business that came into the court, at all times when need should require (*a*). This probably required no more than what was the usage before; as where the court was, there, of course, were to be the justices. However, when it was thus ordained that the chancellor, who kept the great seal, should always attend the king, it might very easily be declared, as it was in the next chapter, that no writ touching the common law should thenceforth issue under the petit seal (*b*), as very likely had before sometimes happened, through the absence of the chancellor.

It was moreover declared by this statute, in confirmation of the common law (*c*), that in pleas of land, the summons and attachments should contain the term of fifteen

(*a*) Ch. 5.

(*b*) Ch. 6.

(*c*) Vid. ant. vol. I. 404, 420.

days at least, according to the common law; unless in attachments of assises taken in the king's presence (*a*), or in pleas before justices itinerant during the eyre (*b*). It was directed also (*c*), that the stat. Westm. 2. c. 39. about false returns, should be faithfully executed. There was a provision (*d*) about the qualifications of jurors, which has been noticed in another place (*e*). This was the whole of the regulations made as to civil justice, except only a law respecting the jurisdiction of the Constable of Dover Castle: it was thereby declared, that he should not hold plea, within the castle-gate, of any foreign matter of the county, except it related to the keeping of the castle; nor was he to distrain the inhabitants of the Cinque Ports to plead any where, or any wise, than according to their charters of ancient franchises confirmed by *Magna Charta* (*f*).

The alterations in the criminal law ordained by this statute, consist in two provisions about conspirators and maintainers; and one about the statute of Winchester. It seems a writ had been framed by *Gilbertus de* ^{Writ of cons} *Rouberie, clericus de concilio domini regis*, and ^{spiracy.}

allowed by the authority of parliament, in the 21st year of this king (*g*), though this statute is usually placed in the 33d year (*h*). This writ was against conspirators, inventors, maintainers of false quarrels (*i*) and partakers thereof, and brokers of debates, and was as follows: *Si A. fecerit, &c. tunc pone, &c. quòd sit coram nobis in octabis sancti Johannis Baptistæ, ubicuncq; tunc fuerimus in Angliâ, ad respondendum prædicto A. de placito conspiracy et transgressionis, SECUNDUM ORDINATIONEM NOSTRAM NUPER INDE PROVISAM, sicut idem A. rationabiliter mon-*

(*a*) Lord Coke says, that these words should be added, "or before the justices of common bench." It is true, indeed, that the term of fifteen days was not allowed in case of disseisin at common law. 2 Inst. 567. Vid. ant. vol. I. 420.

(*b*) Ch. 15.

(*c*) Ch. 16.

(*d*) Ch. 9.

(*e*) Vid. ant. 184.

(*f*) Ch. 7.

(*g*) 2 Inst. 562.

(*h*) St. 3.

(*i*) That is, suits.

strare poterit, quòd ei inde respondere debeat, & habeas ibi nomina plegiorum, et hoc breve, &c. In allusion to this writ, it is said, in the statute we are now speaking of (a), that, as to conspirators, false informers, and evil procurers of dozens, inquests, assises, and juries, the king had provided a remedy for the plaintiffs by a writ out of the chancery. But, notwithstanding this provision, says the statute, the king willed, that his justices of the one bench and the other, and justices assigned to take assises, when they came into the country to discharge their office, should, upon complaint, award inquests therein without writs, and do right to the plaintiffs without delay (b).

We have before mentioned several statutes against maintenance of suits and champerty, in the parliament of Westm. 1. and Westm. 2 (c). but these were all confined to certain ministers therein named, as the chancellor, treasurer, justices, the king's counsellors, clerks of the chancery, of the exchequer, and of justices, and to those of the king's household, clergy or lay. An act was now made in general terms, which declares, that *nul ministre, ne nul outre*, should take upon him a business in suit, to have part of the thing in question. But this was not to prohibit any one from having the counsel and advice of countors and learned men for his fee, nor of his parents or friends (d). Some further notice was taken of these offenders in the subsequent part of this reign.

Because crimes and disorders were thought to have increased through a relaxed police, it was ordained, that the statute of Winchester should be sent again into every county, to be read and published four times a-year, and kept as strictly as the two Great Charters, under the pains therein limited. For the observance and maintenance of this statute it was ordained, that the three knights assigned in the

(a) Stat. art. sup. cart.

(b) Ch. 10.

(c) Vid. ant. 212.

(d) *Ses parentz e ses procheins.* Ch. 11.

county (*a*) to redress offences against the Charters, should have charge of this also (*b*). This statute concludes with some very minute regulations for assaying vessels of gold and silver. No vessel of silver was to pass out of the hands of the workers till it was assayed by the wardens of the craft, and marked with a leopard's head; and no gold was to be worked worse than that of Paris (*c*).

Thus far of the 28th year: in the 29th, there is a statute on the subject of *amoveas manum*, concerning which we before spoke in the statute of *articuli super Chartas* (*d*). It was now ordained, that in all cases where it appeared by an inquest, taken before the king's escheators, that the land did not belong to the king, a writ should be immediately obtained in chancery, commanding the escheators, *quodd manum suam amoveant omnino*, and cause the land, with all issues and fruits of it, to be restored to the right owner. However, if it should afterwards turn out that the king had any title, the person was to be summoned by writ out of chancery to appear *coram rege*, and shew cause why the king should not have the custody of the land; and so *toties quoties* an *amoveas manum* and a *scire faciat* might be had by the party and the king. This was with a *non obstante* of the statute made in the preceding year.

In the 31st year there is a statute entitled, *tractatus de ponderibus et mensuris*: in the 33d there are several statutes; one called, *statutum de protectionibus*; another, containing a definition of conspirators; another, called the statute of champerty; another, an ordinance for inquests; another, *ordinatio forestæ*; another, an ordinance for measuring of land.

We (*e*) often had occasion to mention the obstruction to justice occasioned by the warrant *de servitio regis*. We

(*a*) Namely, by ch. 1. of this stat. Vid. ant. 103. (*b*) Ch. 17.

(*c*) Ch. 20.

(*d*) Vid. ant. 234.

(*e*) Vid. ant. vol. I. 405, 408.

now find a similar device under the denomination of *protection*. By means of such a writ, a person was protected against all suits in the king's courts, under pretence that he was engaged in the king's service. The statute relating to protections was to prevent some of the evil consequences attending those privileges. It was now ordained, that, in such case, the adverse party might challenge the protection, upon its being shewn in court, and aver that the person was within the four seas, or out of the king's service in a certain place, whence he might very easily have come to attend. This challenge was to be entered, and the matter stand without a day, according to the nature of the protection. When it was re-summoned, the party objecting was to demand judgment, and offer to aver his challenge; and if the country passed against him that cast the protection, and he was tenant in the action, the protection was to be turned into a default: if it was the demandant, he was to lose his writ. This was a very beneficial law, at a time when actions were liable to be totally stopped by such regal interpositions.

The (a) next statute defines conspirators in this way: Conspirators are those who confeder and bind themselves together by oath, covenant, or other alliance, that every of them shall aid and bear the other, falsely and maliciously to indite, or cause others to indite, or falsely to move or maintain pleas; also such as cause children within age to appeal men of felony, whereby they are imprisoned and sorely grieved; such as retain men in the country with liveries or fees, to maintain their malicious enterprizes; and this was to extend as well to the takers as givers. Again, stewards and bailiffs of great lords, who by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other people, and not their lords or themselves, were to be considered as conspirators.

(a) Vid. ant. 239.

Champerty was defined by the same statute. *Champtors*, says the act, are those who move, or cause to be moved, pleas and suits, either by their own procurement or by that of others, and sue them at their own costs, to have part of the land in dispute, or part of the gains. This definition of champerty is in the English edition of the statutes, but no original text appears to warrant it: and it is probable, that it was added by some reader to explain what followed; for the next statute is entitled “the statute of champerty,” and ordains, after alluding to the former acts on that subject(*a*), that all persons attainted of such emprizes, suits, or bargains, and such as consented thereto, should be imprisoned for three years, and make fine at the king’s pleasure. The ordinance of inquests(*b*) directs, that when a juror was challenged for the king, the inquisition should not therefore remain; but those who sued for the king should shew some cause of challenge, and the truth of such cause should be enquired of according to the custom of the court; after which the inquisition should be proceeded in or not, according as the challenge was established or not. The *ordinatio forestæ* has been noticed in another place(*c*). The last of this year is the statute for measuring of land.

In the 34th year there are several acts. The first is the statute *de conjunctim feoffatis*; the next consists of some articles upon the statute of Winchester; the remaining three have been mentioned in another place(*d*), namely, that for amortising lands, that *de tallagio non concedendo*, and the *ordinatio forestæ*.

The statute *de conjunctim feoffatis* was to prevent the delay occasioned by tenants in novel disseisin and other writs

(*a*) Viz. 3 Ed. I. c. 25. 13 Ed. I. stat. 1. c. 49. 28 Ed. I. stat. 3. c. 11. Vid. ant. 212.

(*b*) Stat. 4.

(*c*) Vid. ant. 106.

(*d*) Vid. ant. 231, 104, 106.

pleading, that some one else was seised jointly with them (a). It was enacted, that where such a plea was grounded upon a deed, and the plaintiff would offer to aver by the assise that the day of the writ purchased the tenant was sole seised, the justices might retain the deed safely in their keeping till the assise had tried it; and the person named to be jointenant by the deed, as well as the tenant, was to be warned to appear at a certain day, and then to answer to the assise, as though the original writ had been brought against both. It was also enacted, if the plea was found to be false, and for delay, that then, notwithstanding the assise passed for the tenants, yet he who alleged the plea should suffer a year's imprisonment and a heavy fine. Further, the plea of jointenancy was no longer to be received from a bailiff, who, we have seen, was in some cases allowed to put in pleas for his principal. If it was found that they were jointenants, as alleged, the writ was to abate: the same in writs of mortd'ancestor, *juris utrūm*, and other real actions.

There is the following provision in this statute concerning the writ of *indicavit*, which is a writ of prohibition that has frequently been mentioned (b). This writ used to be brought at the commencement of the matter in the spiritual court, so that no room was left to judge whether a writ of consultation should go or not. It was therefore now ordained, that it should not in future go, till they had proceeded so far in the court christian as the *litis contestatio*, and the chancellor could be certified of the nature of the suit by inspection of the libel.

In the 35th year are two statutes: one, *de asportatis religiosorum*, which has been noticed in another place (c); the other, which is the last in this reign, is entitled, from the subject of it, *ne rector prosternat arbores in cameterio*.

(a) For the practice on this point, at common law, vid. ant. vol. I. 474.

(b) Vid. ant. vol. I. 141.

(c) Vid. ant. 157.

Great disputes had happened between rectors and their parishioners, to which of them the trees in the church-yard belonged. It was now declared by this act, that they are sacred property; that they follow the nature of the soil, which is *ecclesiæ dedicatum*, and that the laity had no disposal thereof. However, as they were planted for protecting the church from winds and storms, rectors were prohibited by this act from cutting them, except for reparation of the chancel; nor were they to convert them to any other use, unless the nave of the church needed repair; in which case parsons would do well in bestowing such trees upon the parishioners; though, says the act, we do not command this, but will commend it when done.

We have now travelled through the numerous statutes of this king, and have performed the task, perhaps, with more expedition, and less show of difficulty, than is commonly annexed to the idea of such an undertaking. These statutes have been usually studied with great labour, through the obscurity in which a long lapse of years has involved them; yet the matter of them has been, in all ages of our law, thought so important, as to make that labour be submitted to with patience. These with the statutes of Henry III. are considered as the foundations of the common law; and indeed, after Glanville and Bracton have been so long neglected, the attention of the student could be directed to nothing more ancient. But with all the importance which is so deservedly attributed to them, and notwithstanding the space which the learning upon them fills, when they are viewed in retrospect by a modern lawyer; yet in the historical account that has been here attempted of our ancient legal polity, they appear comparatively small. It is true, that in the reign of this prince many more *statutes* were made in a few years, than in many reigns of his predecessors. Those statutes were very important in their object, and many of them very beneficial in their consequences: but, antecedent to that period, the slow hand of time and

experience had been long moulding our laws and judicature into a form capable of receiving the finishing touches which were made by Edward; and in that respect, perhaps, the turbulent and unprosperous reign of his father Henry was more productive than his. This consideration of the subject will account for the appearance which these statutes, and indeed this whole reign, makes, in point of length, when compared with the former.

Indeed, the changes made in our law by the gradual alteration of opinions during this reign, seem to have been very few. The rules and principles which had been so thoroughly weighed and settled in the reign of Henry III. still operated with all their influence, except in those instances where they were modified by the late statutes. Thus we find the law stated by Fleta and Britton to be the same, almost in every particular, as it was delivered by Bracton, with the addition only of the statutes of Edward I. One exception, however, should not be passed over in silence, which is, that in the law of descent, according to Britton, the half blood was to be excluded (*a*), which had not been settled in the time of Bracton (*b*).

Very little, therefore, remains to be said on any part of the subject, which was so fully handled in the last reign; and we shall confine ourselves to such heads as were there treated rather cursorily, or not mentioned at all. This will be principally in the jurisdiction of courts, and the nature of personal actions.

Of the different courts. We have seen what was said by Bracton upon the different courts (*c*): they are mentioned by the author of Fleta more fully in the following way: *Habet rex curiam suam in concilio suo, in parliamentis suis, presentibus prelatibus, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatae sunt dubitationes judiciorum, et, novis injuriis emersis,*

(*a*) Ch. 119. (*b*) Vid. ant. vol. I. 310, 311. (*c*) Vid. ant. vol. I. 316.

nova constituuntur remedia; et unicuique justitia, prout meruit, retribuetur ibidem. This is the account of the supreme judicature, in which, it should seem, he includes both the council and parliament. The next is the court *coram senescallo suo in aula sua*. This officer is described as filling the place of the chief justiciary (an office that was abolished in the last reign), who used to be named in the writs of the earlier periods, determined the king's own causes, and administered justice without writ (a). In the place of this great officer was now appointed the *senescallus*, or steward of the household. This court has been mentioned before in this reign, and the nature of its jurisdiction was defined by a particular statute (b). Fleta describes this court as having jurisdiction of all actions against the king's peace within the bounds of the household for twelve miles, *ubicunque rex fuerit in Angliâ*; which circuit of twelve miles was called the *virgata regia*, because it was within the government of the *marshal*, who carried a *virga* as the badge of his office. According to the same authority these actions might be brought *recenter*, and without writ, *non obstante privilegio, vel libertate alicujus legem regni expectantis*. This jurisdiction was exercised in the *aula regia*, and the steward might associate with him the *camerarius*, the *hostiarius*, or *marescallus*, being knights; or any of them, if they could not all be present.

The next court of the king mentioned in Fleta, is that held in *cancellariâ*. After this, he says, there was a court *coram auditoribus specialiter à latereregis destinatis*, whose office was not extended beyond the justices and ministers of the king. The business of these auditors was not to determine, but to report to the king what they had heard, that he might direct what was proper to be done between the parties. After these he mentions *curiam suam, et justitios suos, tam milites quam clericos, locum suum*

(a) Vid. ant. vol. I. 114.

(b) Vid. ant. 235.

tenentes in Angliâ, before whom, and before no others (except before himself, or his council, or special auditors), false judgments and errors of justices were reversed and corrected. Before them also were determined writs of appeal, and other writs in criminal matters; trespasses against the king's peace; and all writs which contained the clause *ubicunq; tunc fuerimus in Angliâ*. Next to these he ranks the *justitiarios residentes ad scaccarium*, and those *in banco apud Westmonasterium*; after these, the justices assigned *ad gaolas deliberandas* in different counties; those assigned to take assises, juries, inquisitions, certificates, and attaints; the justices itinerant *ad primas assisas, ad omnia placita, criminalia et civilia*; and the justices itinerant *ad placita de forestis*. All these were the king's courts; to which might be added, others in the country, as the county, tourn, and hundred courts; those in the king's manors, and those in cities and boroughs (a).

Of these courts, that before the steward is the only one which has not been mentioned in the early parts of this History; for which reason it may be proper to add some further account of this court than the short mention made thereof when we were speaking of the statute passed in this reign concerning it. The stewards, says Fleta, had cognizance of all injuries (by which are meant trespasses), and all criminal and personal actions *per inventionem plegiorum de prosequendo*, and were to do ample justice to parties complaining, without allowing any essoin. Thus, when sufficient pledges were found and enrolled by the king's clerk who had the keeping of the *rotulum placitorum aulae pro rege*, the marshal was commanded immediately to attach the person complained of, if he was to be found within the limits of the household; otherwise he was not attachable by the marshal. If the complaint was against any *familiaris regis*, he was first to be summoned; and if he did not come

(a) Fleta, 66. l. 1. c. 1. § 1. 517 (1)

at the appointed day, then there was an award, *quòd attachietur* till a further day; and if he did not come then, there was an award, *quòd corpus capiatur* (provided he had received the summons personally within the verge), and brought before the steward; and then, says Fleta, the marshal was to be his pledge; or, in other words, he was to be continued in the marshal's custody, according to the law and custom of the household; and the marshal was to be answerable to the party complainant, if he did not have the body forthcoming. When Fleta has stated this to be the method of proceeding against a *familiaris regis*, he adds, *quòd dictum est de serviente regis, dici poterit de COMITIBUS, in tantum quantum paritatem consequuntur*: so that the authority of the steward went beyond the king's servants, properly so called.

As this court followed the king wherever his household removed, and so far suspended all other jurisdictions; the method was, when the king was about to fix his residence at any place, for the steward, in the name of the chief justiciary, whose place he filled, to command the sheriff, *quòd venire facias coram nobis* on such a day, *ubicunq; dominus rex tunc fuerit, in ballivâ tuâ*, all assises of novel disseisin, mortaucestor, *ultimæ præsentationis*, great assises; all juries, inquests, attaints, pleas of dower *unde nihil*, which were summoned before the justices *ad primas assisas*; all prisoners, and persons manucaptured or bailed; all attachments which belonged to the gaol-delivery; and all the freemen to compose juries. When the steward arrived at the destined place, he began to discharge the business of the county; beginning, as the justices itinerant did, with the criminal matters. After he had dispatched those (a), he then proceeded to trespasses committed within the verge against the peace; then to the assises, and fines; and lastly, to debts and contracts, where the debtors had voluntarily bound themselves to the dis-

(a) Fleta, 67.

tress of the steward and marshal. Matters that could not be dispatched by him, while there, were to be adjourned, either into the bench, *ad primas assisas*, into the county, or otherwise, as it seemed most expedient. He might direct proceedings to outlawry, waging of the duel, and every thing which belonged to the regular justices itinerant.

The contracting of obligations *ad districtionem senescalli et marescalli*, or one of them, was the means by which the jurisdiction of these officers might be greatly extended, as the plea of *extra virgatam* would not in such case avail: in these matters, and in all others, except pleas of freehold, the parties were heard without writ (*a*). When a person was convicted of a debt before the steward, he was to be committed to the custody of the marshal, till he had satisfied the party for his debt, and the king for his amercement and fine; however, he might be replevied *ex potestate marescalli* for forty days, but no longer (*b*).

So necessary and inseparable an appendage to the king's household was this court thought, that when the king was in France, in the fourteenth year of his reign, and a person was charged with a robbery committed in the household, it was allowed by the French king (after the point of jurisdiction had been contested between his court and that of the English king), that the steward should exercise his jurisdiction; and the offender was accordingly put upon his trial, was sentenced, and hanged.

It will be seen, in the subsequent part of this History, how the steward occasionally delegated his authority to the justices *locum suum tenentes in Angliâ*, who thence assumed to themselves the power to hold plea of suits *by bill* against persons in the custody of the marshal.

The chancery is called by Fleta *an office*, though he had before spoken of a court held *in cancellariâ*. This office,

(*a*) Fleta, 68.

(*b*) Ibid. 69,

(*c*) Ibid. 68.

says he, was intrusted to some discreet person, as a bishop, or other dignified ecclesiastic, together with the care of the great seal. The department of the chancery was carried on by the assistance of several subordinate officers, who are thus described by Fleta (a): *cui associantur clerici honesti, et circumscripti, domino regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorē*: it was the business of these clerks to hear and examine the petitions and complaints of suitors, and give them a remedy by the king's writ, fitted to their case (b). These *collaterales & socii* of the chancellor, as he calls them, were the superior officers there; and were called *præceptores*, on account of the direction they gave, after hearing a complaint, for making out remedial writs. These *masters* had become of greater consideration since the statute (c) had enlarged their power of making out writs *in consimili casu*. The inferior officers are described as *clericos legaliter expertos*. These likewise were acquainted with the forms of writs, and had a power to allow such as they approved, and reject those that were defective. They were to examine all writs as to the matter and stile of them, before they were put to the seal; nor was any to be sealed that did not come through their hands. There were besides six *clerici prænotarii*, who, together with the former, were considered as *familiares* of the king, and were provided with board and clothing out of the profits of the seal, for their trouble of writing out writs. Besides these, there were other clerks (d), who are stiled *juvenes et pedites*, young persons of inferior condition, who, for dispatch of business, were, by the favour of the chancellor, permitted to be employed in making out the *brevia cursoria*. These were to be under the superior clerks, who were to be answerable for all their acts; for which purpose it was required, that the writer's name should be noted on every writ (e).

(a) Fleta, 75.

(b) Ibid. 76.

(c) Vid. ant. 202.]

(d) Fleta, 77.

(e) Ibid. 78.

This is the account given of the chancery, and other courts, by the author of Fleta. The same writer is somewhat minute in relating the proceedings in certain personal actions, particularly that of debt. We shall give from him, first, the method of commencing such an action in the steward's court, and then add something concerning this action, when brought at common law.

An action
of debt in the
steward's
court.

To commence an action of debt in the steward's court, there needed no writ, as was said before, but only to shew the debtor's obligation, and that part of it where he bound himself to the distress of the steward or marshal: then, after security *de prosequendo* was taken of the creditor, the marshal was commanded to distrain the debtor by his chattels, till he had found pledges (provided he was taken within the bounds of the household) to appear the next law-day before the steward to answer the creditor without any essoin, or other delay. If the debtor could be found, he was to be attached *per corpus* till he had obtained his liberty by giving pledges; if he had no pledges, he was to be detained till he answered the creditor, but he was not to be put in chains. Suppose he found pledges, and had a day given him at the end of fifty days, at which he failed to appear, his pledges were amerced, and he was taken, if he could be found within the jurisdiction of the household, and detained, as in the former case: he was not to be again enlarged on pledges till he answered to the suit. If the debtor had been distrained twice, thrice, or oftener, and he at length appeared; yet, before his cattle were delivered, he was to make fine for his contempts, unless he could prove *per legem* that he came as soon as he knew he was called upon to appear; and then, upon giving pledges to stand to the suit, debtors were allowed to have the disposal of their chattels distrained, and were immediately to put in their answer to the creditor.

This was the process against those who bound themselves voluntarily to the distress of the steward or marshal.

But the method of proceeding with those who were *comites*, was more gentle. They were first summoned by the marshal; and if they disobeyed, then they were to be distrained; and the third process, if necessary, was an attachment. In the same manner did they proceed against the *familiares servientes* of the king who were attendant upon him in his house. It was upon this privilege of the king's servants that the saying, then well known, was founded, *quòd servientes regis sunt pares comitibus* (a).

When the debtor came in to answer, he might allege many things against the creditor by way of exception. He might ask, what he had to shew for his debt; and if he had nothing but his own declaration to prove it, the person attached had judgment, *quòd quietus recedat*. But if he produced his *secta*, the debtor was to defend himself *per legem* against the *secta*: the same when the plaintiff produced tallies (b), unless he was a merchant; for it was permitted *de gratia principis*, says Fleta, in favour of merchants, to prove tallies that were denied, by two sworn witnesses at least, who, upon diligent examination, were found to agree upon the day, place, number, and other circumstances thereof.

If a writing was produced, and any default was found in the name or number, the defendant might say, he was not bound to answer such writing, because it was faulty. He might say, *quòd non est factum suum*. He might say, he had paid it, if he had any thing to prove the payment. He might say, he was not bound to the distress of the steward or marshal; and if that was proved, the plaintiff could recover nothing, unless he could reply, that though he was not bound to the distress of the steward or marshal,

(a) Fleta, 131.

(b) A tally is thus defined by Spelman:—*TALLIUM, alias TALEA—est clavola vel ligni portiuncula, utrinque complanata, cui summa debiti inscribitur: fissaque; inde in duas partes, una debitori, altera creditori traditur in rationis memoriam*. It seems a tally was a common security for money in these days.

this could not avail him, for he belonged to the king's household, was always in his service, and in such case he was obliged to answer to the suit: for as he would be entitled to an *essoïn de servitio regis* in every other court, there would be an entire stop to justice, if he could not be sued in this. He might say, he ought not to answer, because he was taken without the limits of the household, and not within the jurisdiction of the marshal, but brought there by violence. He might say, that the king did not reside within twelve miles of the place on the day named in the *narratio*; so that the fact could not happen within the limits of the household, and, of consequence, not within the cognizance of the steward. He might say, it concerned his freehold, and so might demand judgment, whether he was to answer concerning his freehold without a writ. He might say, that the plaintiff had complained of the same trespass in another court, where he *quietus recessit, et querens in misericordiâ pro falso clamore*. He might shew an acquittance; or say, that another plea was then depending in another court by writ for the same matter. If there was a condition in the obligation, he might say, that he was not bound to pay the debt, because the condition was not satisfied (a).

If more than one were bound by the obligation, he might demand judgment, whether he was to answer singly for a debt contracted by many in common. Again, if each was bound to pay the whole, he might say, that one of them paid it for all, and he might vouch the record, or an acquittance of the plaintiff; but if he failed of the record or acquittance, at the day fixed for him to produce it, he was, for his delay, to render double damages to the plaintiff, and be grievously amerced in proportion. If he did not appear at all, on the day appointed, his pledges were to be further distrained till they satisfied the creditor, or rendered to the marshal the body of the principal; and were

(a) Fleta, 132.

likewise to be amerced for the failure of the record or acquittance. He might say, that at the time of making the obligation he was *non compos mentis*, or *non sui juris*, because under age, in the custody of such a one, in prison at such place, or oppressed, or coerced by threats : if a wife, she might say, she was not to answer without her husband. Many other exceptions, which would defeat the plaintiff's action, might be taken.

It should be observed, that when the obligor died, the obligation died with him ; for no one could bind his heir to answer to the distress of the steward or marshal. Again, it must be remembered, that this whole jurisdiction of the steward in matters of debt, which was a *commune placitum*, was against the provision of *Magna Charta* on that point (a); since which, says Fleta, common pleas were to be confined to the justices of the bench, and justices itinerant *ad omnia placita*. But, adds he, this cognizance of certain special causes was given to the steward by the king, in analogy to the jurisdiction exercised by the exchequer over such common pleas as concerned the king, though equally within the chapter of *Magna Charta*: the latter was permitted in hopes that the king might obtain his own debts, through the debtors of his debtor, with more ease than by levying it on his own debtor's lands and chattels. However, it seems this privilege of suing in the exchequer was rarely extended beyond a person *in debito regis vehementer existentem*; and then it was never done but by special permission from the king (b).

Actions of debt were also brought in the county, in cities, boroughs, and franchises, in cases of small demands; and as in the former instance the interest of the king was consulted, in this latter it was for the benefit of the people at large, that they should have justice administered

(a) Vid. ant. vol. I. 244.

(b) See an instance of such permission in Ryley's *Placita Parliamentaria*.

near their own homes without much trouble or expence. Debts under forty shillings were recoverable in the hundred, wapentake, trithing, and other inferior courts belonging to the king or to great lords (a).

Common action of debt. The writs of debt were various. One, since called *si RECOGNOSCAT* (b), was thus: *Rex vicecom. Præcipimus tibi quòd si A. RECOGNOSCAT se debere decem libras, tunc distringas præfatum A. ad prædictum debitum præfato B. sine dilatione reddendum, &c.* This gave the sheriff a record of the matter; and if the debtor acknowledged the debt before the sheriff, he was to be distrained by all his moveables till the creditor was satisfied. If the debtor denied the debt, then the plaintiff had the following writ: *Præcipimus tibi, quòd JUSTICIES A. quòd justè, &c. reddat B. decem marcas quas ei debet, ut dicit, sicut rationabiliter monstrare poterit quòd ei reddere debeat, ne ampliùs inde clamorem audiamus pro defectu justitiæ, &c.* This was a writ of *justicies*; upon which it had been the practice of the sheriffs not to proceed till pledges *de prosequendo* were found. This, however, is blamed by Fleta, since the writ required no such process, but according to that author, they ought only to *command* the debtor, as they were directed by the writ. If he did not make payment forthwith, it was clear he meant to stand out a suit; and should the plaintiff pray, that suit should be made to recover it, then and not till then need he offer pledges *de prosequendo*. Upon such security being given, the debtor was to be summoned by two freemen of the vicinage where he resided, to appear at the next county, to answer in the said plea of debt; and it was sufficient if the matter of such summons was related to any of his family. If he did not appear at the day, nor essoin himself, then on the appearance of the plaintiff, the sheriff was commanded to distrain him till he found pledges to appear, and answer at the next county (c).

(a) Ryley's Pla. Parl. 133. (b) O. N. B. (c) Ryley's Pla. Par. 134.

If the debtor appeared, and the debt was proved, the judgment was, *quòd recuperet debitum cum damnis*; which latter were to be taxed by the sheriff and *sectatores* of the county, if the defendant prayed it; and the defendant was to be *in misericordia*: the bailiff of the hundred where the defendant had most moveables, was then commanded, *quòd de catallis suis habere faciat, &c.* Should the bailiff be remiss in this, and not properly execute the writ; or should the debtor, in order to defraud the creditor, have designedly suffered his land to lie unstocked, and no beasts or chattels were to be found thereon; in such case, it was adviseable for the creditor to remove the plea by *pone* to the superior court, and then execution might be had in any hundred or county; and of the land also, by an *elegit*, grounded on the late statute (a).

But to save the trouble of such removal by *pone*, it would be better to commence the action originally before the justices of the bench, by the following writ: *Præcipe A. quòd justè, &c. reddat B. decem marcas quas ei debet et injustè detinet, ut dicit: et nisi fecerit, et præfatus B. fecerit te securum de clamore suo proseguendo, tunc summone per bonos summonitores præfatum A. quòd sit coram justitiariis nostris apud Westmonasterium tali die, ostensurus quare non fecerit, &c.* This writ differs very little from the writ of debt in Glanville's time (b). There was another writ of debt now in use for executors: *Præcipe A. quòd justè, &c. reddat B. &c. executoribus testamenti talis, &c.*; and, on the other hand, one against executors: *Præcipe A. et B. executoribus testamenti C. quòd justè, &c.* Respecting executors, it was held at this time, that if they demanded a sight of the instrument by which a debt was claimed against them, they could not afterwards plead, *quòd de bonis defuncti nullam habent administrationem* (c).

(a) Vid. ant. 187.

(b) Vid. ant. vol. I. 158.

(c) Fleta, 135.

Another writ cognisable in the county, was one which has not yet been mentioned, and which was called *de annuo redditu*. This likewise might be pleaded in the county, and was as follows: *Præcipimus tibi, quòd justiciæ A. quòd justè, &c. reddat B. DECEM MARCAS, quæ ei à retrò sunt de annuo redditu tanti per annum, sicut rationabiliter, &c.* An *annuus redditus* might be due in three ways; either where a lord was seised of a certain rent, together with homage and fealty, issuing out of a freehold; or, where the lord had assigned over the rent, which remained as a charge upon the freehold into whatsoever hands it passed: the third way was, when the rent was received not out of a freehold, but *de camerâ*, from a chamber, or the like, for the life of somebody. The writ of annuity went for the arrears and damages: to the damages the defendant might answer *per legem*; but to the arrears he could not. This writ would lie upon the mere writing containing the grant, without any seisin having been obtained (a).

To return to the action of debt. If the sureties were distrained without proceeding against the principal debtor, who yet was able to pay, they might have a writ to the following effect, directed to the sheriff: *Monstraverunt nobis A. et B. quòd cum ipsi, &c.* stating that they were sureties only, and were distrained, notwithstanding the principal debtor was sufficient, which ought not to be; therefore *Tibi præcipimus, quòd distringas præd. C. the principal debtor, pro præd. pecuniâ, et præd. plegiis pacem habere permittas; et averia sua si qua eâ occasione ceperis, sine dilatione deliberari facias, &c.* It has been before seen (b), what provisions had been made in case of sureties for debts due to the king. We now find, that if the sureties had paid the debt of the principal, or had incurred any

(a) Fleta, 136.

(b) Vid. ant. vol. I. 243.

damage on account of it, they might have the following writ: *Præcipimus tibi, quòd justicies A. quòd justè, &c. ACQUIETET B. de centum solidis unde posuit eum plegium versus C. & nondum eum acquietavit, ut dicit, sicut eum rationabiliter monstrare poterit, quòd eum acquietare debeat, ne amplius, &c.* which, like other justicies, might be removed into the superior court by *pone*. If the action was brought originally in the superior court, the writ was thus: *Præcipe A. quòd justè, &c. acquietet B. de centum solidis, unde, &c.* This writ, nearly in these words, was in use in Glanville's time (a); but it should seem, it then lay for the creditor only against the surety; now it lay for the surety against the principal; as the surety, by paying the debt, had put himself in the place of the original creditor.

We have seen what was the method of proof in an action of debt in Glanville's time (b). Nothing is said on this subject by Bracton; but from the practice, which obtained in many actions, of bringing a *secta*, and afterwards a jury, it is most probable, the mode of trial in his time was the same as is stated by Fleta in this reign. That writer says, that if the creditor had no writing to shew, he was to take some other method of making out what he calls *rationabilem monstrationem* that a debt existed; for, continues he, it had been ordained by *Magna Charta*, that no one should be put to answer either *per legem* or *per juramentum* upon the simple voice of another (c). The creditor was therefore to produce a *secta*, that is, the testimony of certain lawful men who were present at the contract; and if these, upon being examined by the judge, were found to agree, then the defendant was to *vadiare legem*, as it was now called, or wage his law against the plaintiff and his *secta*. The mode in which this was done, is thus described

(a) Vid. ant. vol. I. 159.

(b) Vid. ant. vol. I. 161.

(c) Vid. ant. vol. I. 248.

by Fleta: If the plaintiff produced two witnesses, the defendant was to produce four; if three, he was to produce six; so that the defendant was always to have two *juratos* to the plaintiff's one, till they came to twelve; and they did not ever go further than *duodecimam manum*. In this case, says he, the proof lay upon the person who denied the charge (a). It was a rule, that where the right was equal, the defendant rather than the plaintiff should be admitted to the proof. The waging of law was considered as making a proof, and always surpassed the presumption raised by the *secta*; according to the rule, that *lex vincit sectam*. If any of the *jurors* (for so those who swore for the defendant were called) refused to swear, or those produced were not sufficient, the defendant was convicted. If the *secta* varied in their account, the defendant was not put to wage his law against it, but had judgment, *quòd recedat sine die, et querens in misericordiâ*.

What is said of a *secta* to prove the verbal declaration of the plaintiff, held equally where a *secta* was produced to prove a tally; for if a tally was not supported by a *secta*, credit would be given to the single oath of the party *denying* it. But, says Fleta, it is otherwise in cities and fairs, and in causes between merchants, in favour of whom, as was shewn before, it was granted *ex gratiâ principis*, that the proof should lie on the party *affirming*; they therefore might prove their tallies, if denied, *per testes et per patriam*. There was this remarkable custom among merchants, that where a tally was produced to support an action, and another was produced to prove that the first was discharged, which tally of discharge was denied, the person whose tally was denied was to prove it in this way: he was to go to nine churches, and upon the nine altars of them he was to swear, that the plaintiff gave him the said tally as an acquittance of the debt contained therein, "so help me

(a) Fleta, 136.

“ God and his holy gospels;” after which the judgment was, *quòd recedat inde quietus in perpetuum*, and the plaintiff *in misericordiâ* (a). It was because these methods of proof left too much room for debtors to avail themselves of their hardness in swearing, that another method of recovering debts was contrived by the statute-merchant.

This is all that is said by Fleta on personal actions; so that what he has left on this subject is confined wholly to the action of debt, and that *de annuo redditu*: nor is Britton more explicit. For further information therefore on this subject, we must have recourse to other sources. In the *statutum Walliæ* we find mention of other personal writs, with the proceeding upon them, as prescribed for the use of the Principality. There can be no doubt but this detail was copied from the course of proceeding in the English courts, and is particularly worthy of attention on that account. We shall therefore extract from thence what is said on the action of *debt*, *covenant*, and *trespass*.

The writ of debt hitherto mentioned was for the recovery of money owing; but in this statute we find a writ for the recovery of a chattel belonging to the plaintiff. The following is a writ of this kind: *Præcipe A. quòd justè et sine dilatione reddat B. unum saccum lanæ pretii decem marcarum, quam ei injustè DETINET; et nisi fecerit, &c.* This writ was in after-
Of detinue.
 times called *detinue*; being in effect nothing else than a writ of debt, which, when brought to recover a chattel, was in the *detinet*, instead of the *debet*.

The process to be pursued in a writ of debt in Wales was this: Upon pledges *de prosequendo* being found, the debtor was summoned to appear at a certain day, and if he failed, was summoned again. If he failed at the second summons, and did not esoin himself, the debt was adjudged to the plaintiff by default, with damages at the discretion of

(a) Fleta, 138.

the justice, or by an inquest of the country, as the justice pleased, and the debtor to be in *misericordiâ*. If the debtor appeared, then the plaintiff was to set forth the ground of his action; and, to prove it, he was to produce his *secta*, or a charter of obligation, or a tally. If the defendant denied the debt, and his obligation was produced against him, the writing was to be verified *per testes nominatos in obligatione*, if they were alive, *simul cum patriâ*. If there were no witnesses, or they were dead, it was to be verified only *per patriam*, and, according to the verdict of the country, judgment was to be given. If the plaintiff had no obligation, but only produced a *secta*, or *tally*, the defendant might defend himself either *per legem*, that he owed him nothing (that is, by his own oath and that of eleven swearing with him) or *per patriam*, as he pleased. Again, if the defendant said he had paid the debt, he was to shew an acquittance; to which the plaintiff might answer, by denying, either *per legem* or *per patriam*, that he had received any thing.

Of covenants.

The writ *de conventionione*, or of covenant, was sometimes for recovery of moveables, sometimes of immoveables. No forms of this writ are mentioned by Bracton or Fleta; but in the *statutum Walliæ* we find the following: *Præcipe A. quòd justè et sine dilatione TENEAT B. CONVENTIONEM inter eos factam de uno messuagio, cum decem acris terræ, et quinq; acris bosci, cum pertinentiis in N. Et nisi fecerit, &c. tunc summoneas prædictum A. quòd sit, &c. ostensurus, &c.* These writs varied according to the nature of the covenant, and might be returnable before the justices, or, by a clause of *justicies*, in the county.

The process in a writ of covenant was as follows: Upon pledges *de prosequendo* being found, the defendant was to be summoned once, and, if needful, a second time. If he did not come at the second summons, nor send an *essoïn*, the *petitio* of the plaintiff was to be heard, and the thing in question, if a tenement, was to be taken into the king's

hands; if a chattel, the thing *or* its value; and another day was given to the parties. If within fifteen days he replevied the thing so taken, and came at the day appointed, he was received to answer and make his defence; but if he did not appear, the claim of the plaintiff was adjudged to him by default, together with damages taxed, as above-mentioned in a writ of debt, and he was to be *in misericordia*. If the defendant appeared, both parties came to allegations, and at length to an inquest of the country, by which the matter was determined. There is no mention of any *secta* in this action; though it is most probable there was one in this as in other actions.

A freehold was sometimes demanded in a writ of covenant; as when land was demised upon a certain firm or rent, with a condition, that should the firm not be paid, the person demising might enter and hold the land; in such case, should the rent be in arrear, and the demisor not able to make an entry, he might recover the land, together with damages, by a writ of covenant. Again, when an agreement was made between two persons, that one should infeoff the other of a freehold, and give him seisin by such a day; if afterwards he infeoffed a third person of that tenement, then a writ of covenant would lie against him, not to recover the land (which having passed by lawful feoffment could not go back), but money or damages for the breach of covenant. Thus we see, that, in some cases, land could be recovered in a writ of covenant; and in such case it was a real action: in others, only damages; and then it was a personal one. In after-times, the former writ of covenant was that on which fines were generally levied.

We have seen a provision made in this reign Of trespass.
(a) to confine actions of *trespass*, where the damages were not more than forty shillings, to the inferior

(a) Vid. ant. 149.

courts; and another (a) for shortening the process of attachment. Of this action we have been enabled to say very little: neither Bracton, Fleta, nor Britton, give any particular account of the nature of the proceeding therein, after the parties were in court; nor do they even exhibit the form of the writ. In the *statutum Walliæ* it is directed, that the justice should command the sheriff, *quòd faciat venire* the person complained of, at an early day. The plaintiff was to set forth his complaint, as in other actions, and the defendant to make his answers thereto. As it could scarcely happen, says the statute, but the defendant would defend himself *per patriam*, the justice was to inquire the truth by a good and sufficient *patria*, by consent of the party: if the defendant was found guilty, he was to punish him by imprisonment, or fine, or *misericordiâ*, and also by damages, which were to be given to the party injured, according to the nature of the trespass. This inquisition was to be taken, as we said, by consent of the parties; for if the plaintiff offered to verify the trespass *per patriam*, and the defendant refused the country, he was taken *pro convicto*, and suffered the same penalty as if he had been convicted by the country.

Though the writers of this period say so little upon the action of trespass, it happens that a complete record of the proceedings in trespass, from the writ to the award of a *venire*, is to be seen in Ryley's Collection. As this will furnish a specimen of records in other actions, as well as in trespass, the reader will not think it tedious to read it at length. This record was in the 21st year of the king. It begins with a recital of the execution of the writ of attachment. *A. B. et C. attachiati fuerunt ad respondendum D. personæ ecclesiæ de Cheping-norton de placito, quare, vi et armis, in præfatum D. in suâ domo inventum insultum fecerunt, et ipsum a domo suâ extraxerunt, et bona et catalla*

(a) Vid. ant. 124.

sua ibidem inventa ad valentiam centum librarum ceperunt, et asportaverunt, consumpserunt, et voluntatem suam inde fecerunt, et alia enormia ei intulerunt, ad grave damnum ipsius D. et contra pacem, &c. After this, there followed a similar entry of the *narratio* upon the writ, in these words: *Et unde queritur, quòd prædictus A. et alii die sabbati proximâ post festum St. Johannis Bapt. hoc anno, vi et armis, venerunt ad domum ipsius D. apud Cheping-norton, et in præfatum D. in eâdem domo inventum insultum fecerunt, et ipsum a domo suâ extraxerunt, et bona et catalla sua ibidem inventa, viz. blada, frumentum, hordeum, avenam, cicerem, et quandam cistam in camerâ suâ ibidem inventam fregerunt, in quâ fuerunt diversa jocalia, ut cippi aurei et argentei, firmacula et annuli de auro et argento, et alia diversa scripta obligatoria de debitis quaterviginti marcarum et plus, sibi per diversos debitores debitis, et bona illa, et scripta, et alia bona ad valentiam centum librarum ceperunt, et asportaverunt, consumpserunt, et voluntatem suam inde fecerunt, viz. vina biberunt, cicerem, blada sua cum equis, et hominibus suis consumpserunt, et alia enormia ei intulerunt, ad damnum ipsius D. quingentarum marcarum, et contra pacem, &c. Et inde producit sectam, &c.*

Then the plea begun as follows: *Et prædicti A. et alii per attornatum ipsorum B. et C. veniunt, et defendunt vim, et injuriam, et quicquid est contra pacem, &c. Et idem A. pro se et aliis dicit, quòd ipse est persona ecclesiæ de Cheping-norton, et fuit prædictis die et anno; et eodem die accessit ipse ad ecclesiam suam prædictam, et ad domos suas eidem ecclesiæ annexas et pertinentes, de quibus domibus omnes prædecessores sui, personæ prædictæ ecclesiæ, fuerunt seisiti tanquam pertinentibus ecclesiæ suæ prædictæ, ut de jure ejusdem; et sic ipse A. et alii prædictis die et anno ad domos ipsius A. venerunt, de quibus domibus ipsemet jam multo tempore præterito extitit in seisinâ. Sed tam idem A. quàm alii bene defendunt, quòd ad domum prædicti D. prædictis die et anno, vi et armis, non venerunt, nec in ipsum D. insultum fecerunt, nec ipsum a domo suâ extraxerunt, nec aliqua*

bona sua ceperunt, asportaverunt, aut consumpserunt, sicut eis imponunt; et de hoc ponunt se super patriam.

To this the plaintiff replied as follows: *Et prædictus D. bene cognoscit, quòd prædictæ domus sunt pertinentes ecclesiæ prædictæ; sed dicit, quòd ipse jam undecim annis elapsis extitit persona præfatæ ecclesiæ, et in plenariâ possessione ejusdem, et pacificâ; et hoc notorium et publicum est per totum comitatum Oxoniæ; et fuit in pacificâ possessione ejusdem prædictis die et anno quando prædictus A. &c. vi et armis, ut prædictum est, in ipsum D. in domibus suis propriis insultum fecerunt, et ipsum de domo suâ extraxerunt, et alia enormia, &c. ut prædicitur, ei intulerunt, contra pacem, &c. Et quòd ita sit, petit quòd inquiretur per patriam, et prædictus A. et alii similiter.* Then follows the award of a venire: *Ideò præceptum est vicecomiti, quòd venire faciat coram domino rege in octabis St. Mich. ubicunque tunc fuerit in Angliâ, &c. 24 tam milites, &c. per quos, &c. Et qui nec, &c. ad recognoscendum in formâ prædictâ, quia tam, &c. (a).*

It appears from hence, that the *narratio* had become of more consideration than in the reign of Henry III. It was now drawn with more form and precision, and was liable to be excepted to, if deficient in either. We find in the last reign (b), the order in which a defendant was to state his exceptions was this: first to the jurisdiction of the court; then to the person of the plaintiff; next to that of the defendant: if they were both proper parties to the suit, then he might except to the writ. The writ, as it contained the ground of the action, and was the only part of the proceedings in writing (the *narratio* and the rest being all alleged *vivâ voce* at the bar of the court), was the most formal part of the proceeding, and that by which principally the defendant was to shape his defence. The only nicety almost in pleading was what arose upon the writ; which was examined, both in its form and substance, with much curious criticism. The *narratio* at that time

(a) Ryley's Plac. Parl. 1. 2. 5.

(b) Vid. ant. vol. I. 451.

was subject to no exception; but we find, in the time of Fleta, that exceptions to the *narratio* were pleas of course, and followed next after those to the writ. As the writ was a brief state of the demand, it was required of the plaintiff to spread out his case more fully in his *narratio*, pursuing still the style and words of the writ; for a difference between them was a good cause of exception. The next plea after that to the *narratio*, was to the action of the writ; and lastly, came pleas in bar of the action (a).

The method in which the pleading in an action was conducted, seems to have been this: When the cause came on in court, first the writ was read; next the advocate for the plaintiff stated his case more fully, which was called *narrare*, or *to count*; from whence such statement was called the *narratio*, or *count*; then the advocate for the defendant put in his *exception*, or plea; and so they went on to reply, rejoin, take issue, or demur, as it seemed adviseable. All this was transacted *vivâ voce* by the advocates on both sides; and the prothonotary (or themselves) minuted it down. If the advocates were over-ruled by the court, or wished to retract or amend, they were at liberty so to do, and it was accordingly done *instantanter*. The whole seemed to be managed very much in the way of the scholastic disputations, so fashionable in those days. When pleading was practised in this manner, it had more the appearance of argument than of form.

There was some little variation in the manner of dealing with jurors in civil causes. The method of effecting an unanimity among jurors, by afforcing the assise, as mentioned by Glanville and Bracton (b), was now in some measure altered. Fleta lays it down for law, that, when there was a difference of opinion among the jurors, it was at the election of the judge either to afforce the assise, by adding

(a) Flet. 116, 117, 118.

(b) Vid. ant. vol. I.

others till twelve were found who were unanimous, or to *compel* the assise to agree among themselves, by directing the sheriff to keep them without meat or drink till they all agreed in their verdict (a). Another method was, to enter the verdict of the major and lesser part of the jurors, and then judgment was given *ex dicto majoris partis juratorum* (b). Jurors might, in civil cases, give a verdict upon their belief; which two latter modes were also used in the last reign.

The criminal law. The criminal law continued, through this reign, much in the state in which we left it in the former. However, the definition of some crimes was a little altered; and there seems to have been a variation in the method of trying persons who had been indicted.

It has been before surmised, that the provision about *peine forte et dure* was intended to effect a change in the method of proceeding by presentment; so that offenders, when indicted, should not be permitted to make purgations, but should be obliged to put themselves on an inquest (c). This seems to be corroborated by Britton in more than one passage, where he treats of presentments. In speaking of those indicted by *presentment*, he says, if they *ne se voillent acquitter*, will not put themselves upon their acquittal, they shall be put to their penance till they pray to do it (d). As the other words of the statute, before alluded to, are here used, it cannot be doubted, but the *acquittal* spoken of must mean the inquest directed by the statute. Afterwards, speaking of a defendant putting himself upon the country, he says, when the jurors came into court, they might be challenged; and he states one cause of challenge to a juror, that he was one of those who *indicted* him; and there was a presumption that all who indicted him, still bore the same ill-will against him (e). It is also said by Britton,

(a) Fleta, 230.

(b) Vid. 2 Hal. P. C. 297.

(c) Vid. ant. 137.

(d) Britt. 11.

(e) Ibid. 12.

that a person indicted should have fifteen days for his defence (*a*); which adds to the probability, that the inquest he was to be put upon for his acquittal, was not the same which presented the offence.

The manner in which this second inquest was ordered, is thus described by the same author: When the jurors came into court, the challenges were to be made, the principal of which was that above mentioned; and if the prisoner could not, or would not challenge them, or there was a sufficient number of jurors unchallenged, that is, to the number of twelve, then they were to go to the book. If there were not sufficient, then the challenges were to be tried; and if they were found true, so that there was not a full *dozen*, another day was to be appointed, and the sheriff was to summon more. When the oath was put, they were to swear, one after another, that they would speak the truth of what should be demanded of them on the part of the king; but there was to be no mention of their *belief* in cases of life and limb, it being required that in matters of so high concern they should speak upon their knowledge only. After this, the justices were to give a charge to the jurors upon the matter concerning which they were to speak the truth. They were then all to go and confer together, and be kept by bailiffs, so that no one should be suffered to go near them; and if any one did, or there was any one of them who was not sworn, he was to be sent to prison, and all the others amerced, as a punishment for merely suffering it. If they should not agree, they were to be separated, and interrogated, why they could not: and, after all, according to the sense in which Britton is interpreted by a late editor, the opinion of a greater number was to be followed (*b*); though no other author

(*a*) Britt. 10. b.

(*b*) See Kelham's translation of that part of Britton which relates to the pleas of the crown, pa. 42.

speaks of a verdict being taken in a *criminal* case without the concurrence of all the jurors; and such unanimity is expressly required by Fleta (a). If they all declared upon their oaths, that they knew nothing of the fact, others were to be put in their place who did know it; and if he who put himself on the first inquest would not put himself on the new jury, he was, according to our author, to be remanded to penance till he did.

Further, if the prisoner finding the verdict was likely to pass against him, would say, that some of the jurors were about to procure his condemnation, at the instigation of the lord of whom he held his land, to obtain an escheat, or from any other motives; then the justices were carefully to question them, and make strict examination and inquiry how they were satisfied of their verdict. They perhaps might say, one of their fellow-jurors told it them; and he (proceeds our author) perhaps might say, that he heard it asserted for a truth at a tavern, or some other place, by one of the rabble, or such a one as nobody ought to give credit to. If it appeared to the justices, that one of the jurors was influenced, or was intreated or procured by the lord, or by the enemies of the indicted, to get him condemned, they were to cause the procurers to be taken and punished by imprisonment and fine. Britton lays it down as a rule, that should the jurors be doubtful of the matter, and nothing certain could be made out, they should, in such case, always find for the defendant (b).

It appears very evidently from this account of the inquest upon which a prisoner put himself to establish his innocence, that the jurors were considered as *witnesses*, the same as in other juries, and in assises; and to call witnesses before them would have been absurd, and not at all consonant with the notion entertained of this proceeding. They were *sworn to speak the truth*; to discharge which

(a) Fleta, 52.

(b) Kelham's Britton, from pa. 34 to 45.

duty they must speak from their own knowledge, and not from the testimony of others; and as they came from the vicinage where the fact was committed, none, it was thought, could be better able to perform the office than themselves.

It was many years after this reign, and when the second (since called the *petty*) jury began to be considered rather as judges of the presumption raised by the finding of the presentors, than as witnesses of the fact, that a kind of evidence used to be exhibited to them. The first evidence made use of in this way consisted of written papers; such as depositions, informations, and examinations, taken out of court: this led by degrees to a sparing use of *vivâ voce* testimony. It was long before they thought it necessary to bring evidence into court in support of the prosecution, and it was still longer before they allowed the prisoner to disprove the indictment by any thing else than the oaths of the twelve *jurati*. When a prisoner was permitted to call witnesses to prove such matter as he offered in his defence, it was a high favour; and depended much on the discretion of the court, and the manner in which the charge had been made out by the prosecutors: besides this, the witnesses for the prisoner were never upon oath; which always left a pretence for discrediting their testimony.

The trial by jury at the time of which we are now writing, was, to all intents and purposes, a trial by witnesses; and, no doubt, deserved all the value that was set on it by our ancestors. When the condition of society so changed, that, notwithstanding all the supposition of their personal knowledge of the fact, as coming from the vicinage, they were in reality wholly ignorant of it; and it was necessary the charge should be *proved* to them, before they could pronounce on the guilt or innocence of the party; then the old proceeding became a piece of mummery, productive of oppression and tyranny, till at length it was softened

by the calling of witnesses to inform the conscience of the twelve jurors. This was the last improvement of the trial by jury in criminal cases, and was not thoroughly effected till the times of Edward VI. and queen Mary.

The inclination in favour of juries had gone so far in this reign, that there seemed a backwardness to allow the trial by duel, where a defendant insisted upon it as his right; which could only be in an appeal. Should there be any slip in the proceedings of which the defendant had omitted to avail himself, the judge was *ex officio* to examine and point it out, in order to stop the duel. Fleta says, that this was a trial not to be resorted to rashly (*a*), if by any possible means it could be avoided (*b*). Another alteration in our criminal proceedings was, that the eyre was no longer to be a time of limitation for the prosecution of offenders, but they might be prosecuted at any distance of time (*c*).

It has been before shewn, what was ordained by statute concerning the exemption of the clergy from criminal jurisdiction (*d*). The practice in Britton's time, respecting clerks, is thus stated by that author: If a clerk accused of felony pleaded his clergy, and was found to be a clerk, and was demanded by the ordinary, it was then to be inquired whether he was guilty; and if he was found not guilty, he was to have judgment of acquittal; if guilty, his chattels were to be appraised, his land seized into the hands of the king, and his body delivered to the ordinary; and if the ordinary delivered him out of prison before he was acquitted according to the due order of canonical purgation, or if he kept him so negligently as to let him escape, or maliciously kept him in such manner as to prevent his coming to

(*a*) *Cum levitate.*

(*b*) Flet. 51.

(*c*) Wingate's Britt. pa. 12.

(*d*) Vid. ant. 134.

make his purgation; in either of these cases the ordinary, if convicted of such misbehaviour, was to be *in misericordia*. Upon the ordinary certifying that a clerk so delivered to him was acquitted by purgation, restitution was to be made of his goods, provided he had not fled. Further, if the ordinary, either in person, or by his procurator, demanded one who was a layman or *bigamus*, or not of a condition to be entitled to clergy, he was to be punished by imprisonment; as was also a procurator who in any case presented himself as such, without any authority in writing from the ordinary (a).

There are some variations between the description of offences given by Britton and his cotemporary Fleta. Fleta speaks of treason almost in the words of Bracton (b); but Britton says, treason is every mischief which a man knowingly does, or procures to be done, to one to whom he is in duty bound to be a friend. Treasons he divides into *grand* and *petit*; though he does not specify what were to be ranked as the one or the other. Some of these treasons were punished by judgment of death; some by loss of limb, pillory, or imprisonment; and others by a slighter penalty, as the case required. *Grand* or *high treason* was to compass the king's death, or to disinherit him of his realm, or to falsify his seal, or to counterfeit or clip his coin. A person might also, says our author, commit high treason against others several ways; as a villain procuring the death of his lord who was seised of him; and those who drew persons into such perils as to lose life and member, or chattels (c).

It seems, from this account of it, that the crime of treason was very vague and undefined; so that almost any enormity might, by construction, be brought within the penalty of it. The same author goes on and says, that

(a) Wingate's Britt. pa. 11. (b) Flet. 31. Vid. ant. 5.

(c) Wingate's Britt. pa. 16.

the judgment in high treason was, to be drawn, and suffer death for the felony; and, says he, the same judgment ought to be given against those who, in appeals of felony, were attainted of counterfeiting, or otherwise falsifying the seal of their lord of whose dependence or homage they were; or of committing adultery with the wives of their lords; of deflowering the daughters of their lords, or the nurses of their children. A woman attainted of any treason was to be burnt. Those attainted of falsifying the seal, if the fact was of small consequence, were to have judgment of pillory only, or to lose an ear; but if the fact was of an enormous and heinous nature, as if it produced disherison, or any lasting damage, the offender was to have judgment of death (a).

Arson was, when any, in time of peace, feloniously burnt others corn or houses: such offenders were to be burnt, that they might suffer in the same manner in which they had offended. The same punishment of burning was to be inflicted on sorcerers, sodomites, and heretics (b).

The crime of *hamsoken* is barely mentioned by Bracton, without any description of it. Offenders of this kind are called by Britton *burgessours*, since called *burglars*; and are described to be such as feloniously in time of peace break churches, or the mansion-houses of others, or the walls or gates of cities or boroughs; except they are infants under the age of discretion, and poor people, who, through hunger, enter the house of another for food, and take under the value of twelve-pence; excepting also idiots, madmen, and others whom the law would not consider as capable of committing felony. *Burgessours* were to be punished with death (c).

The stat. Westm. 1. (d) seems to consider the stealing of twelve-pence as a petty larceny. The statute *articuli su-*

(a) Fleta, 16. b. (b) Ibid. (c) Ibid. 17. (d) Vid. ant. 132.

per Chartas seems to require the taking to be more than twelve-pence (*a*). Fleta says, if a person steals the value of twelve-pence, *et ultra*, it shall be death (*b*); Britton says, if it is twelve-pence or more (*c*); though in another passage he says, that death would follow if the value was under twelve-pence. So that it seemed to be not quite settled whether the sum was twelve-pence, or more, that induced the penalty of death. The latter author makes no distinction between robbers and thieves, as to this point. If any persons, says he, were indicted by presentment of *robbery* or *larceny*, or of cutting purses; of receiving felons; of enchantment, as pretending to charm people; of cheating, by selling bad things for good, as pewter for silver, or brass for gold; or were guilty of the like small offences, they were to be apprehended; if they could not be found, they were to be outlawed: and if judgment was passed against them, they were to be hanged, or to lose an ear, or to be pilloried, in proportion to their crime and the frequency of committing it (*d*): so discretionary and various were punishments at this time.

Again, in petty larcenies, says our author, as for stealing sheaves of corn in August, or pigeons or poultry, if the offender was not suspected of any other crime, and the thing stolen was under the value of twelve-pence, he was to be put in the pillory for an hour, and to be disabled from taking the oath of a juror, or being a witness. If they were persons of bad character, or offended out of mere malice, and not through want (*e*), (which was an extenuation, if not even a justification, adopted from the canon law) (*f*), then they were to lose an ear, and become infamous. For a second offence it was to be in the discretion of the justices either to sentence them to death, or to order their other ear to be cut off; and for the third offence, whether the crime was great or small, they were to suffer death.

(*a*) Vid. ant. 234. (*b*) Fleta, 55. (*c*) Britt. 22. (*d*) Ibid. 23. b.

(*e*) Ibid. 24. (*f*) Corv. Jus. Can. lib. 4. tit. 23.

Cut-purses were, for the first offence, to be sentenced to the pillory. If they had stolen other things under the value of twelve-pence, then they were to lose their ears; if the value was more than twelve-pence, they were to be hanged (a).

The crime of homicide was, at this time, extended to persons who seemed to act in authority, and void of all guilt. Felony, says Britton, may be committed under colour of judgment, as through malice of a judge; or under other colour, as by an unskilful physician or bad surgeon; by poison, and sundry other ways. It might likewise be committed by those who, whether for hire or otherwise, had condemned, or caused any one to be condemned to death, by taking a false oath: so that perjury, if it had the effect of procuring a judgment of death, was punished with death.

Among the additions made to our body of national canon law, we find in this reign the constitutions of the archbishops Peckham and Winchelsey. These were confined to subjects purely of a clerical nature, without touching upon those points of controversy, that had so long inflamed the temporal and spiritual jurisdictions against each other.

King and government. The character of Edward is that of a brave and wise prince; qualities which well fitted him for the undertaking to improve our laws, and maintain the execution of them with vigour. The king took a personal interest in reforming our legal-polity, deeming the due and strict administration of justice the best defence against the turbulence of the great barons. By affording protection to his inferior subjects, he at once diminished the power of the great, and reduced the whole nation under the dominion of law.

(a) Wingate's Britt. pa. 24.

It was in this spirit that he erected the court of *Trailbaston* (a). This was a commission of oyer and terminer of an unusual kind, and was issued in the fulness of zeal for the correction of public disorders. The rigour, however, with which this was executed creating some discontents, it was thought expedient in a course of time to discontinue it.

The heavy penalties inflicted on the judges for malpractices, are instances of the concern this king took in the execution of the laws. At one time all the judges, except two, were convicted of corruption, and fines were set upon them, amounting in the whole to the immense sum of 100,000 marks. It is related, that the offence of one of them, the famous *Ralph de Hengham*, was, altering a record of a fine on a poor man from 13s. 4d. to 6s. 8d. This unseasonable act of humanity was punished with the penalty of 7000 marks; a punishment which struck a terror into all future judges; made every iota of a record be thenceforward most religiously preserved; and, perhaps, contributed not a little to encourage the scruples which prevailed afterwards with regard to the minutest errors in judicial proceedings.

The manner in which this inquiry about the judges was made, gives a trait of Edward's character, and of that of the times. From the best consideration of the different accounts given of this transaction (b), it does not appear to have passed in parliament, but to have been a mere exertion of regal power.

Indeed Edward, through the whole of his reign, however he might exact from others an obedience to the laws, affected to place himself above the restraint of them. The ill grace with which he confirmed *Magna Charta*; his

(a) Namely, by the statute of *Ragman*, *de justiciariis assignatis*, among the *statuta incerti temporis*.

(b) Parl. Hist. vol. I. 93, 94.

frequent breaches of it; his procuring a dispensation from the oath he had taken to observe it; his levying money without assent of parliament, even after the statute *de tallagio non concedendo*; all these are strong proofs how determined he was to preserve, if possible, the authority which had been once assumed by the crown.

Perhaps one of the strongest acts of power attempted since the granting of the Charters, was executed by Edward. This was when, by an edict signed by some barons then in parliament (but whilst all the prelates were violently excluded from thence), he put the whole body of the clergy out of the protection of law. "No manner of justice," said the ordinance, "shall be done them in any of the king's courts; but justice shall be *had against them* to every one that will complain and require it of us (a)."

It was common to issue letters of protection to stop the ordinary course of justice: this occasioned the statute *de Protectionibus* (b). This practice, however, continued afterwards, and was the subject of many complaints in the two next reigns.

Statutes and records. It is unnecessary to observe, that in this king's reign there are many more statutes extant than in that of Henry III. It is the opinion of some, that many more were enacted than those which have come down to us; otherwise, it is said, the sudden advance made in the law during this reign, beyond that of any other, could not be accounted for.

The authentic information derived from records is very much increased in this reign. The *Placita Parliamentaria*, collected and published by Riley, contain many records of proceedings before the king in council, and so far give an insight into the nature of that kind of memorials. Besides these, there are extant judicial records of the king's

(a) Parl. Hist. vol. I. 116.

(b) Vid. ant. 241.

bench, the common bench, and the eyre. It appears from these, that pleadings were very short, but perspicuous, without involving the matter in any multiplicity of words. The records are for the most part orderly and clear, relating the several steps made in a suit, with the judgment thereon, and generally expressing the rule and reason upon which the judgment was given (*a*).

There are some few broken notes of adjudged cases to be found in Fitzherbert's Abridgment; and there are said to be manuscript reports of this period in private hands, but not in any regular series (*b*).

Among the steps this king had taken to promote the improvement of the law and the administration of justice, he caused some treatises to be composed (*c*); of which *Fleta* and the treatises of *Britton* and *Thornton* are supposed to be some.

Fleta, seu Commentarius Juris Anglicani Fleta.
(for so it is entitled), is a treatise upon the whole law, as it stood at the time this author wrote. It is divided into six books; the first whereof treats of the rights of persons, and of pleas of the crown; the second, of courts and officers; the third, of methods of acquiring titles to things; the fourth and fifth, of actions grounded upon a seisin, and of writs of entry; the sixth, of a writ of right. The author of this work has followed Bracton in the manner and matter of it, having adopted his plan, and in many instances transcribed whole pages from him. He did not, however, confine himself to Bracton as his sole guide, but had also an eye to Glanville. Many obscure passages in those writers are illustrated by *Fleta*. It seems as if the author wrote with both these treatises, particularly Bracton's, before him; and that his design was to give a concise account of the law, with the altera-

(*a*) Hale's Hist. com. law. 157.

(*b*) In Lincoln's Inn and the Middle Temple libraries. Hale's Hist. Ibid.

(*c*) 35 Hen. VI. 42. a.

tions which had been made by parliament since Bracton wrote; supplying such parts as had been left untouched by him, and dilating upon others that had been passed over with too little attention. Thus *Fleta* serves as an appendix, and often as a commentary, to Bracton. But if *Fleta* contains much which is not to be found in Bracton, it is deficient in much more which abounds in that author; most of the subjects so minutely discussed by Bracton, being passed over in a very brief manner; so that, with all its new matter, this volume is not more than one-third of the size of Bracton. The writer of this commentary seems to have followed his master Bracton in his acquaintance with the canon and civil law; though he is less frequent in the use of them, and then it is in a manner less likely to mislead the reader. This author was wholly an imitator. As he followed Bracton in the design of his work, he has copied the *Proœmium* from Glanville, *verbatim*; and after all, the idea was borrowed from that prefixed to the *Institutes* of Justinian.

This book was written after the thirteenth year of the king, and not much later; at least the statutes towards the latter end of this reign are not mentioned, though that of Westminster 2. is frequently quoted. The occasion of the title to this book is given by the author himself, who says, it was written during his confinement in the *Fleet-prison* (a). From that circumstance it has been conjectured, that he might be one of those lawyers who, for mal-practices in their office as judges, were punished with imprisonment and pecuniary penalties (b).

The small French tract under the name of Britton. *Britton* is thought to have been composed under the direction of Edward. The singular form of it seems to countenance such a supposition; for the contents of the whole book are put into the king's mouth,

(a) In *Proœm.*(b) *Diss.* ad *Flet.* ch. 10.

and the law so delivered has the appearance of being promulgated by the immediate voice of the sovereign. This work is shorter than the former, and is little more than a compendium. It is attributed by some to John Breton, who was bishop of Hereford, and a judge; but as he died in the third year of this king's reign, and this treatise takes notice of statutes made in the 13th, the truth of this account is justly doubted (*a*). By others it is considered as nothing more than an abridgment of Bracton, with the subsequent alterations that had been made in the law; and that it is called *Britton*, as one of the names of *Bracton* himself (*b*).

This French tract, as it is written in the language which the law spoke for many years after, engages the curiosity of a modern reader in a particular manner. In the writings of Bracton and Fleta every thing is seen as it were through a cloud, disguised in the terms and phraseology of the Latin tongue; whereas *Britton* addresses you in the technical, proper style of the law: you here perceive a determinate meaning, conveyed in precise terms, and are enabled to form an opinion from it with more confidence and certainty.

Another treatise composed in this reign, was Hengham. that of *Radulph de Hengham*, who had been chief justice, and was, for misconduct, degraded from his office, with many others of his fellow-justices. This consists of two parts; one called *Summa Magna*, and the other *Summa Parva*. It seems to be a collection of notes relating to proceedings in actions; and must have proved extremely useful to a practicer of those times. The same may be said of the little French tract called *Fet Assavoir*, printed at the end of *Fleta*.

Chief-Justice *Thornton* made a *summa*, or Thornton. abridgment of Bracton, containing most of

(*a*) Diss. ad Flet. ca. 2, 3.

(*b*) Ibid.

the titles of the law in a concise form. Though a professed epitomiser, he omits many things in that author, and does not adhere to his method (a).

The foregoing writers, in addition to Glanville and Bracton, and together with *The Mirror* (of which we defer saying any thing till the next reign) must have thrown great light on the study of the law in these early ages, and were no doubt for a time of great authority with lawyers. It is true, that we do not find these authors cited in such reports of decisions as have come down to us; but, in later times, Lord Coke, in his inquiries into the grounds of our law, particularly in those works which were chiefly designed for the closet, begins all his investigations, where the subject will allow it, from these old tracts, and thence traces down the confirmations or alterations the law received in succeeding times. The changes which have happened in the law since that author's time, particularly by the abolition of tenures, have made these treatises less read than they were even in his days. Perhaps, of all of them, *Fleta* is that which is most frequently looked into, owing to its being written after many of king Edward's statutes, and to the comment which it sometimes gives upon them.

The chief of these writers are *Glanville*, *Bracton*, *Fleta*, and *Britton*. But the comparative merit of these four authors appears very different in the eyes of a modern reader. The copiousness, learning, and profoundness of Bracton place him very high above the rest. It is to him that we owe *Fleta* and *Britton*, which would probably never have existed without him. To him we are indebted for a thorough discussion of the principles and grounds of our old law, which had before lain in obscurity. But while we give to Bracton the praise that is due to him, as

(a) Dis. ad Flet. ch. 24.

the father of legal learning, we must not forget what Bracton as well as posterity owe to others. Britton delivered some of this writer's matter in the proper language of the law, and Fleta illustrated some of his obscurities; while Glanville, who led the way, is still entitled to the veneration always due to those who first open the paths to science (a).

(a) If there needed any other cause than the antiquity and obsolescence of the subject, to account for the little use now made of these old authors, it might be found in the form in which they are printed. Glanville, who, from his shortness and simplicity, stands a better chance of being dipped into, has been lately reprinted, and the public are obliged to the editor for the pains he has taken in collating several manuscripts; but there are faults in this edition, which are owing to the too great regard that has been paid to established texts; for the old printed copy seems to be reprinted with all the erroneous punctuation, which might have been easily corrected by a little consideration of those passages that are now wholly obscured by it. Bracton is very faulty in the text, and needs the care that the above editor has bestowed on his author. Besides which, the running-titles not being at all applicable to the contents of the pages to which they are prefixed, the inconvenient divisions of chapters, with the want of paragraphs and of marginal notes to catch the eye, and relieve the attention, make this book very tiresome to read. The same may be said of Britton; though his text, I think, is less faulty. It cannot be denied, that, owing to these circumstances, the pages of Bracton and Britton are forbidding, at the first opening of them. The edition of Fleta is less blameable in these particulars, and, perhaps, is more read on that account; though the text is full as incorrect as that of Bracton, or more so. It would be of great service to the study of our old law, if these authors were printed in a more *readable* form.

What we might expect in vain from the professors of the law who have no leisure, or from those who have leisure, but no inclination for such a work, has actually been performed by a *foreigner*. *M. Houard, avocat au parlement de Normandie*, in pursuit of his favourite study of the Anglo-Norman jurisprudence, has republished in four volumes quarto, not only the treatises of Glanville, Fleta, Britton, and the *Mirroir*, but also the Anglo-Saxon laws, those of William the Conqueror and of Henry I. the *Codex Legum Veterum*, the *Regiam Majestatem*, and the rest of Skene's Collection. It is but justice to this curious foreigner to acknowledge, that he has discharged the useful office of an editor with some credit, in amending the mutilated texts of these authors; at the same time we must express a wish that this task had fallen into the hands of an annotator who was not warped by any whimsical system, and was better acquainted with the law and constitution of England. It is probable, such a person would not have discarded

Among the monuments of the king's ecclesiastical law, are to be reckoned the provincial constitutions of archbishop Peckham and archbishop Winchelsey; but our national canon law acquired in this reign an ornament and support of a new kind. Among the numerous commentators and glossists on the civil and pontifical law, a man of learning stood forth to do equal honour to the English ecclesiastical law. *John de Athona*, by his copious commentary on the legatine constitutions of cardinals Otto and Ottoboni, passed in the last reign, set the first example of that kind to our canonists, and laid the foundation of a future body of juridical learning for the guide of our clerical courts (a).

Miscellaneous facts. Edward was extremely careful to provide his courts with persons properly qualified to practise there. In the 20th year of his reign (b), he specially directed *John de Mettingham*, then chief justice of the bench, and the rest of his fellow-justices of that court, to provide and appoint, according to their discretion, from every county, *attornatos et apprenticios, qui curiam sequantur; et se de negotiis in eadem curiâ intromittant, et alii non*. It appeared to the king and council that *seven score* would be sufficient; but the justices, if they saw fit, were authorized to exceed that number (c).

The different orders of practicers are thus stated by Fleta: *servientes, narratores, attornati, et apprenticii* (d). The apprentices, it should seem, were students, who, it is said (and probably by the above ordinance), were first permitted by Edward I. to practise in the king's-bench, in order to qualify themselves to become in a course of years *servientes*, or serjeants. Whether *servientes* and *narratores*

Bracton from this catalogue of English Lawyers; and it is more than probable, he would not have committed the numberless mistakes with which Mr. Houard's annotations abound.

(a) Duck. de Auth. lib. 2.

(b) Plac. Parl. 20. Ed. I. Rot. in dors.

(c) Ryl. Plac. Parl. 104.

(d) Lib. 2. c. 37.

(or, as they were called in French, *countors*) were two distinct orders, or *narrator* was only an additional description of a serjeant, may be doubted. It has commonly been taken in the latter sense, in stat. Westm. 1. c. 29 (a), where the same words come together, *si serjeant countor, ou autre*; and that statute ordains imprisonment for a year and a day on a person of that description who was guilty of any collusion in practice. As neither attornies nor apprentices are mentioned in that statute, we may suppose such persons were not then entrusted with the conduct of business in court; if so, it is probable they had not that authority till the above ordinance; though it may be observed, that Fleta speaks of them as equally subject to this punishment with serjeant countors.

The first mention of *capitalis justitiarius* of the bench, is in the first year of Edward I. This style was now conferred, probably for the first time, in conformity with that of *capitalis justitiarius*, assumed in the latter part of Henry III. by the chief justice in the king's-bench (b).

The salaries of the justices were at this time very uncertain, and, upon the whole, they sunk from what they had been in the reign of Henry III. Thomas de Weyland, chief justice of the bench in 7 Ed. I. had but 40*l. per ann.* and the other justices there 40 marks. This continued the proportion in both benches till 25 Ed. III. then the salary of the chief in the king's bench fell to 50 marks, that is, 33*l. 6s. 8d.* while that of the chief of the bench was augmented to 100 marks; which may be considered as an evidence of the increase of business and attendance there. The chief baron had 40*l.* the salaries of the other justices and barons were reduced to 20*l.* (c).

It seems, that it was thought too great a burthen on the justices of the two benches to attend the assises, accord-

(a) Vid. ant. 128.

(b) Dugd. Or. Jur. 39.

(c) Ibid. 104.

ing to the late statute of *nisi prius*; the king therefore appointed eight persons to take assises, juries, and certificates: writs of assise, juries, and recognition, were to be directed to these, and to no other person, except *de speciali gratiâ regis* (a).

(a) Ril. Pla. 130.

CHAP. XII.

EDWARD II.

Statutum de Militibus—Statute de Frangentibus Prisonam—Statute of Articuli Cleri—Sheriffs to be nominated by the Judges—Statute of Gavelet—Of levying Fines—The Statute Prærogativa Regis—Of Homage and Fealty—Statuta Incerti Temporis—Possessio Fratris, &c.—Gifts in Tail—Of Writs of Formedon—Other real Writs—Writs of Conspiracy and Deceit—Action of Debt—Detinue de Rationabili Parte—Actions of Accompt—Action of Trespass—Of Pleadings and Arguments in Court—The Criminal Law—The King and Government—The Vetera Statuta—The Year-Books—The Mirror—Miscellaneous Facts.

THE reign of this king does not make so inconsiderable a figure in our juridical as in our civil history. Notwithstanding the weakness of the executive power, the judicial establishment of our forefathers, and the reformation made therein by Edward I. continued unshaken. In some points this reign has an advantage over all the former, when viewed by a modern lawyer; for the earliest report of cases adjudged in court is the Year-Book of this king. This opens a new source of information, which will enable us to pursue our inquiries concerning the progress of legal knowledge and improvement with more certainty and effect.

We shall divide the matter of this reign into such as is furnished by statutes, and such as may be collected from the decisions of courts; and shall begin with the former.

The first statute in this reign is the *statutum de militibus*, which is said to be not properly a legislative act, but a writ granted by the king in time of parliament, and entered, by his direction, on the record; from which circumstance this, like many other similar instruments, is said to have acquired the name of a statute (*a*). In addition to the burthens of tenure, which have been frequently mentioned, there was one, which from the alteration of times and circumstances was becoming very grievous. It was held as a consequence of the military system, that every one possessed of a *feodum militare* should *suscipere arma militaria*, that is, take upon him the order of knight-hood, or, what was more desirable to those who exacted this casualty, pay a fine in lieu of it.

We have not yet met with any regulation for ascertaining what should be the parcel of land to constitute a knight's fee; and probably it had been various at different times, depending upon the pleasure of the crown and the compliance of the people. As this was the measure for a particular mode of raising money, it was material, that it should be defined with some certainty. On the occasion of a new levy, it was now thought convenient, that directions should be given for the government of the king's officers in collecting this revenue, as was done by this writ; in which the king *granted*, in the first place, a respite to all those who ought, but had omitted, to become knights, and were then distrained *ad arma militaria suscipienda*. Further, it directed, that if any complained in the chancery that he was distrained, and had not land to the value of

(*a*) 2 Inst. 593. Vid. ant. vol. I. 215. and ant. 153.

twenty pounds (*a*), in fee, or for term of his life, and was ready to verify that by the country, then some discreet and lawful knights of the county should be written to, in order to make inquisition of the matter; and if they found it to be so, he was to have redress, and the distress was to cease. Again, where a person was impleaded for the whole, or for such a part of his land, that the remainder was not of the value of twenty pounds, and he would verify the fact, then also the distress should cease till that plea was determined. Again, where a person was bound in certain debts stalled in the exchequer, at a certain sum to be received thereof annually, and the remainder of his land was not worth twenty pounds *per annum*, the distress was to cease till the debt was paid. None was to be distrained *ad arma militaria suscipienda*, till the age of twenty-one; nor any on account of land which he held in manors of the ancient demesne of the crown, as a sokeman; considering, that those lands must pay a tallage, when the king's lands were tallaged.

With respect to those who held land in socage of other manors, and who performed no *servitium forinsecum* (*b*), the rolls of chancery in the times of the king's predecessors were to be searched, and it was to be ordered according to the former custom: the same of clerks in holy orders holding any lay fee, who would, if laymen, be liable to become knights. No one was to be distrained for his burgages, though they were of the value of twenty pounds or more. Those who ought to become knights, and who had had their land only a short time; those who were extremely old, or had any infirmity in their limbs; or alleged that they had some incurable disease, or the impediment of children, or law-suits, or other necessary excuses; such persons were to appear before two commissioners appointed,

(*a*) Vid. ant. 104. This was the value by which persons were then summoned to attend the king in his foreign war.

(*b*) Vid. ant. vol. I. 274.

and make fine before them; and these commissioners were to take discretionary fines from such disabled persons, by way of composition. Thus was provision made for the due payment of one of those casualties, which was supported under pretence of defending the realm, while the extreme rigour of these exactions was somewhat abated.

Statute de frangentibus prisonam. There is another act of the same year, called *statutum de frangentibus prisonam*. It

appears by our old law (a), that a prisoner, for whatever cause, breaking out of the king's prison was esteemed guilty of felony (b). In the 23d of Edward I. an act was passed in the very words of this we are now going to speak of, making some alteration therein. That act is not in our printed books; and this of 1 Ed. II. probably was nothing more than a recital and affirmation of the former (c), but has had the success to reach posterity, and render the former unnecessary, and, therefore, forgotten. This act ordained, that none from thenceforth, who broke prison, should have judgment of life and limb for breaking prison only, unless the cause for which he was taken and imprisoned required such a judgment, if he was lawfully convicted thereof.

In the second year of this king there is a public instrument for the purpose of enforcing the statute of *Articuli super Chartas*; and in the following year another, intitled, *Litteræ patentes super prisis bonorum cleri*, for observing a statute made in the last reign, in protection of religious societies, and ecclesiastical men, against the taking of their goods without their consent (d). In the 7th year of the king there are two acts intitled, one, *Ne quis occasionetur pro reditu*; the other, *Pro captione et morte Petri de Gaveston*; after which, in the 9th year, is the famous statute made at Lincoln called *Articuli cleri*.

(a) Vid. ant. 15.

(b) A provision was made in the last reign, to restrain the too hasty punishment of gaolers for escapes of felons. Vid. ant. 125.

(c) 2 Inst. 589.

(d) Vid. ant. 108.

This act was to adjust some of those eccle-
 siastical claims of cognizance which have been
 so often mentioned. We have seen what had been at-
 tempted by the clergy, in the last and the preceding reigns,
 towards confirming their ancient claims of judicature;
 and the manner in which the legislature pleased to inter-
 pose, in order, if possible, to make some adjustment or
 compromise in a matter of so much concern, both to the
 spiritual and temporal polity (a). Thus did this dispute
 rest till the present parliament, when Walter Reynolds,
 archbishop of Canterbury, a person in great esteem with
 the king, preferred in the name of himself and the clergy,
 the following sixteen articles, and received by authority of
 parliament answers *seriatim* to every one of them.

The first four articles were these: That laymen pur-
 chased prohibitions generally upon tithes, obventions, ob-
 lations, mortuaries, redemption of penance, violent laying
 of hands on clerks, or converts, and in cases of defama-
 tion, where spiritual penance was the proper punishment.
 To these the king answered (conformably with the regula-
 tion of the statute of *Circumspectè agatis*), first, that in
 tythes, oblations, obventions, mortuaries, when they were
 propounded under those names, the king's prohibition should
 hold no place, although for the long withholding thereof
 they might be estimated at a sum certain: but it was de-
 clared, if a clerk or religious man sell his tythes, when ga-
 thered in his barn or otherwise, to any one for money, and
 the money was demanded before a spiritual judge, the
 king's prohibition should lie; for by the sale, the spiritual
 goods were made temporal, the tythes being turned into
 chattels (b). Secondly, it was answered, if there was a
 contest about a right to tythes founded upon a right to the
 patronage, and the quantity of such tythes amounted to the

(a) Vid. ant. 215.

(b) Ch. 1.

fourth part of the goods of the church, a prohibition was to lie; alluding to the writ of *Indicavit*, that has been so often mentioned (a). If a prelate enjoined a pecuniary penalty for an offence, and that penalty was demanded, the king's prohibition was to lie; but if the prelates imposed a corporal pain, and the person to be so punished would, of his own accord, redeem such pain by money, a prohibition was not to lie (b). Thirdly, it was answered, when violent hands were laid upon a clerk, the amends *pro violatâ pace* were to be *coram rege*; those *pro excommunicatione* were to be *coram prælato*, where corporal penance might be enjoined; and if the offender would redeem that by money, paid either to the bishop, or the party grieved, it might be demanded before the bishop (as before said), and the prohibition should not lie (c). Fourthly, the prelates were to have power of correction in causes of defamation, notwithstanding a prohibition (d). Most of these points had been before considered by the legislature in the statute of *Circumspectè agatis* (e).

The next may be considered as the fifth article, and was this: That, on the erection of a new mill, if tithe thereof was demanded by the rector, a prohibition of the following kind used to go: *Quia de molendino tali hactenus decimæ non fuerunt solutæ, prohibemus, &c. et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omninè*. To this it was answered, that such a prohibition never issued with the king's consent, and that, in future, it should never go (f).

The sixth article of complaint was, that when any thing of spiritual cognizance had been determined definitively before the spiritual judge, and had passed *in rem judicatam*, and was not suspended by appeal, and afterwards a question was moved before a temporal judge between the same par-

(a) Vid. ant. vol. I. 141; and ant. 197.

(b) Ch. 2.

(c) Ch. 3.

(d) Ch. 4.

(e) Vid. ant. 216.

(f) Ch. 5.

ties, upon the same thing; this was not allowed as an exception in the temporal court. To this it was answered, that because a matter was discussed before ecclesiastical and temporal judges *diversis rationibus* (as in the case of laying violent hands on a clerk), therefore, notwithstanding any judgment in the spiritual court, the king's court might discuss it, if the party should think proper to bring it there (a). The seventh article complained, that, when persons were excommunicated, the king's letter used to be sent to the ordinaries, commanding them to absolve them by a certain day; or, otherwise, that they should appear and shew for what cause they excommunicated them. To this it was answered, that such a letter should not issue in future, unless where the king's liberty was injured by the excommunication (b).

The remainder of these articles was as follows: Eighthly, it was complained, that the barons of the exchequer, not content with claiming for themselves the privilege of not answering to any complaint out of that court, extended it to their clerks in office there, who were summoned either *ad ordines* or *ad residentiam*; and that they inhibited diocesans from calling them to judgment, so long as they were in the exchequer, or in the king's service. To this it was answered, that it was the king's pleasure, that such clerks as attended in his service, should, if they offended, be corrected by their ordinary, as other persons; but that, so long as they were occupied about the exchequer, they should not be bound to residence; and it was further added, by the direction of parliament, that it had been used, time out of mind, for the king's clerks who were employed in his service, during the time of their service, not to be compelled to keep residence at their benefices (c). The ninth

(a) Ch. 6. This point seems to have been thoroughly established in the late famous case of the dutchess of Kingston. (b) Ch. 7.

(c) Ch. 8. There was a writ entitled *De non residentiâ clerici regis*. Reg. 58. b.

complains, that the king's officers, as sheriffs and others, entered into the fees of the church to make distresses, and sometimes took the parson's beasts in the king's highway, where he had no land but such as belonged to the church. To this it was answered, that such distresses should not in future be made, either in the king's highway, or in the ancient possessions of the church, but only in such as were newly acquired to the church (*a*). A similar provision, as to distresses in the highway, had been made by the statute of Marlbridge (*b*); and as laymen were intitled to an action upon that statute, the parson might have an action on this for distraining in the highway.

The tenth article of complaint was, that when persons fled to a church, and abjured the realm, according to the custom of the realm, laymen, or their enemies, would pursue them, and take them, if they were out of the king's highway; so that they were hanged or beheaded, as persons who had broke the condition of their abjuration. Further, that while they were in sanctuary, in the church, or church-yard, they were kept so closely by persons in arms, that they could not go forth on the calls of nature, or to provide themselves with victuals (*c*). To this it was answered, that those who abjured the realm, were, so long as they continued in the common way, in the king's peace, and should not be disturbed by any one; and while they were in the church, their keepers were not to continue in the church-yard, unless some necessity, or the danger of an escape, required it: while they were in the church, they were not to be driven to the necessity of flying from thence, but should be supplied with what they wanted, and be permitted to go out on their occasions. The king was willing, likewise, that thieves or appellors might, when they pleased, confess their offences to priests; but confessors were to

(*a*) Ch. 9.

(*b*) Vid. ant. 69.

(*c*) Vjd. ant. 23.

take care that they did not erroneously inform such appellors. The eleventh article complains of some instances in which religious men had long been oppressed, and which was provided for by a statute made at the beginning of the last reign (*a*). The king now answered, that the said statute should be observed: and the like remedy was to be pursued in cases of corodies and pensions, obtained by compulsion, whereof no mention was made in that statute (*b*).

The twelfth article says, that if any one of the king's tenure was called before the ordinary out of the parish where he lived, and was excommunicated for manifest contumacy, and, after forty days, a writ issued to take him, such person would pretend a privilege that he ought not to be cited out of the town or parish where his dwelling was; and for that reason, the king's writ for the taking of him was denied. To this it was answered, that it never was, nor ever should be, denied (*c*). The thirteenth article prayed, that spiritual persons presented by the king to church-benefices (if refused admission by the bishop, either for want of learning, or other reasonable cause), might not in such cases be under the examination of lay persons, as had been lately attempted, contrary to the canons, but should sue for redress to the spiritual judge. To this it was answered, that the ability of a parson presented to a benefice was to be examined by the spiritual judge; and so the law had always been (*d*). The fourteenth article prays, that elections to vacant dignities might be free. To this it was answered, that the statutes made in such case should be observed (*e*), alluding to the stat. 3 Ed. I. ch. 5 (*f*).

The two remaining articles relate to the immunity claimed for the persons of clerks in cases of felony. The

(*a*) Vid. ant. 108. And also a writ for the same purpose, vid. ant. 290.

(*b*) Ch. 11. (*c*) Ch. 12. (*d*) Ch. 13. (*e*) Ch. 14. (*f*) Vid. ant. 109.

fifteenth says, though a clerk ought not to be judged before a temporal judge, nor any thing done against him that concerned life or member, yet temporal judges caused clerks fleeing to a church, and perhaps confessing their offences, to abjure the realm; so that, though they could not properly be their judges, yet by admitting their abjuration, the temporal judges put them in danger of death, if after such abjuration they were found within the realm. To this it was answered, that a clerk fleeing to a church for felony, should not, if he affirmed himself to be a clerk, be compelled to abjure; but, on yielding himself to the law of the land, should enjoy the ecclesiastical privilege, as had long been used (a). The sixteenth article was on the like cause of complaint; and states, that though a confession of a crime before a person who was *non judex* should not be good, nor sufficient to ground process and sentence upon; yet some secular judges admitted clerks who were not liable to their jurisdiction, and who were charged before them of theft, robbery, and homicide, to confess their offences, and accuse others (that is, become provors), and then would not deliver such provors to the ordinary, when demanded, though the judge acknowledged he had no authority to condemn them. To this the king answered, that the privilege of holy church, when demanded in due form by the ordinary, should not be denied (b); so that clerks were not to be compelled to abjure, nor were to lose their clergy by becoming provors.

In this manner was the grand question between the ecclesiastical and temporal courts, as it were, compromised by mutual concessions, and settled upon a foot on which it has stood ever since, with very little alteration; the provisions of this act being the rule by which most of these points were afterwards governed, as will be seen in the subsequent part of this History.

(a) Ch. 15.

(b) Ch. 16.

In the same year there was a material alteration made in the old judicial constitution, by transferring the appointment of sheriffs from the election of the people (*a*) (who were confirmed in that privilege by a statute of the late king) (*b*) to a nomination by the judges. It was complained, that great damage had been sustained by the king, and great oppressions by the people, owing to the insufficiency of sheriffs and hundredors, by which was meant *bailiffs* of hundreds: in order therefore to avoid the like in future it was enacted, by statute 9 Ed. II. st. 2. that sheriffs should be assigned by the chancellor, treasurer, barons of the exchequer, and justices; and that none should be sheriff, unless he had sufficient land within the county of which he was sheriff, to answer to the king and his people. Further, that nobody who was steward or bailiff to a great lord should be made sheriff, unless he was out of their service, so as to be able to attend the execution of his office as sheriff. It was also enacted, that hundreds, whether they belonged to the king or to others, should be kept by convenient and able persons, who had sufficient land within the same hundred, or within the county in which the hundred was; and they were to be assigned by the chancellor, treasurer, barons, and justices, as above mentioned. Hundreds were to be lett to hundredors at a reasonable rent, so that they need not be driven to extortion, in order to pay an exorbitant ferm; but no sheriff or hundredor was to lease his office to another, in ferm or otherwise. The execution of all writs, which came to the sheriffs, was to be made by the hundredors sworn and known in the county, unless there was any default in the hundredors, and then by other persons meet and sworn, in order that people might know to whom to sue such executions. This

Sheriffs to be nominated by the judges.

(*a*) We have seen what complaint there was of the extortions and abuses committed by the elected sheriffs; the experience of these mischiefs, probably, justified the measure of taking the nomination from the people, and placing it in the crown. Vid. ant. 235.

(*b*) Vid. ant. 235.

statute was sent to all the sheriffs in England (according to the ancient mode of publishing statutes, at least such as were of a particular nature), accompanied with a writ, commanding them to cause it to be read *in pleno comitatu*, and to be observed in all points; besides which precaution, it was sealed with the great seal, and sent to the treasurer and barons of the exchequer, and justices of both benches, that they might maintain it in all points.

The *statutum de vicecomitibus, et aliis de viridi cera*, 14 Ed. II. contrives a shorter process in the exchequer to compel sheriffs to make acquittances to the king's debtors; and gives some direction for ordering the twenty-four jurors in attaints. This statute also was sent by a writ to the justices *ad placita coram nobis tenenda assignatis*, to those also of the bench, and to the treasurer and barons of the exchequer.

To return to the order of time from which we are digressing. In the 10th of the king there is the statute of *Gavelet*, as it is called. *Gavelet*, or *Gaveletum*, is explained to be *a leasing, or letting, to pay rent*; and *consuetudo de Gavelet* was when, upon a rent or service being withheld, denied, or detained, a forfeiture of the tenement followed. This was originally the general law of feuds in England^(a); but being elsewhere softened into a distress, remained only the custom in Kent, where lands were held in *gavelkind*; and there, when no distress could be found on the land, the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time if the tenant came and paid his rent, he was admitted to his tenement; if not, the lord might make a regular entry and enjoy it^(b). The present act was to introduce the like practice into the city of London; for which purpose it ordained, that where a person had rents issuing out of tenements in the city of London, and such rents were in arrear, he might distrain so long as

(a) Vid. ant. 145. and vol. I. 123.

(b) Termes de la Ley.

any thing was to be found in the fee; and if there was nothing which could be distrained, then the tenant might be impleaded *de gavellet* by a writ *de consuetudinibus et servitiis*. If he denied the services, the plaintiff was immediately to name his *secta*, consisting only of two witnesses, whose names were to be enrolled; and he was to have a day to produce them at the next hustings: if the witnesses then proved, *de pleno visu et auditu*, that the plaintiff had at any time received the rents demanded, the tenant was to lose his fee by the award of the court, and the plaintiff was to recover the tenements in demesne. If the tenant refused to acknowledge the services, and likewise the arrears, the arrears were to be doubled by judgment of the court, and the tenant was to give to the sheriff, for the wrongful withholding, one hundred shillings, if he was worth so much. If the tenant did not come in upon due summons, in the hustings, then the fee was to be delivered to the plaintiff in full hustings, to be held for a year and a day; within which time if the tenant came, and offered to satisfy the plaintiff to the amount of double the arrears, and the sheriff for his amercements, as before mentioned, then he was to have his tenements again; but after the year and day the lands were, by judgment of court, to remain to the lord of the fee in demesne for ever: the same where tenants acknowledged the arrears, and were not able to make satisfaction.

The principal statutes of this king which have not yet been mentioned, are the statute of York, 12 Ed. II. st. 1. the statute of essoins, 12 Ed. II. st. 2. the statute of Carlisle, 15 Ed. II. and the *prærogativa regis*, 17 Ed. II.

It was designed by the statute of York, 12 Ed. II. st. 1. to supply the defect of some former laws relating to the administration of justice. It was found inconvenient that tenants in assises of novel disseisin could not make attornies; it was therefore ordained that they should have that

power, with a saving, however, of the liberty to plead by bailiffs if they pleased, as had been the practice heretofore^(a). Again, it was *agreed*, says the statute, that when a charter, quit-claim, acquittance, or other writing was denied in the king's court, wherein witnesses were named, process should be awarded to compel such witnesses to appear, as had before been used. But if none of them came at the great distress returned, or if it was returned that they had nothing, or they could not be found, yet the taking of the inquest was not to be deferred by the absence of such witnesses. If the witnesses came at the great distress, and the inquest, for some cause, remained untaken, the witnesses that came in were to have the same day given them as was assigned for taking the inquest; at which time if the witnesses did not appear, the issues that were first returned upon them were to be forfeit. The taking of an inquest was not to be delayed on account of the absence of witnesses living within franchises, where the king's original writ did not run^(b).

An alteration was made in the order of taking inquests by *nisi prius*. We have seen what alteration had been made in this establishment by stat. 27 Ed. I. st. 1. ch. 4^(c), directing that inquests should be taken before any justice of the place, associating with him some *knight* of the county, if they had no need of great examination. But it was now directed, that inquests and juries in pleas of land that required no great examination, should be taken in the country, before a justice of the court where the plea depended, associating with him a^(d) *substantial man* of the country, knight or other; so that a certain day be given in bank, and a certain day and place in the country, in the presence of the parties, if the demandant prayed it. As to inquests and juries in pleas of land that required great exa-

(a) Ch. 1. Vid. ant. 205.

(b) Ch. 2.

(c) Vid. ant. 174.

(d) So is the expression, *prod' home*, rendered by the translator of this statute.

mination, they were to be taken in the country, in the above way, before *two justices* of the bench (*a*); and the justice or justices were to have power to record nonsuits and defaults in the country, at the day and places assigned, as before mentioned. What they had done in the above places, was to be reported in bank at a day certain, there to be enrolled, and judgment to be given. However, it was not meant that such inquests and juries should not be taken in bank, if the jurors came. It should seem, the practice now had become for the *venire facias* sometimes to be made returnable in bank, preceding the going of the justices; and then, upon the default of the jurors in bank, a *habeas corpora* or *distringas* issued to cause them to come before the justices in the country. It was enacted, this statute should not extend to great assises.

Further, it was enacted, that a justice of the one bench or the other, associating to himself (*b*) a *substantial man* of the country, knight or other, at the *request* of the plaintiff, should take inquests upon pleas moved by attachment and distress, and have power to record nonsuits, as above mentioned, and take inquests upon defaults there made. As to assises of *darrein presentment*, and inquests to be taken on writs of *quare impedit*, they were to be ordered according to the statute of Westm. 2 (*c*): besides which, the justices were to have power to record nonsuits and defaults in the country, and to give judgment thereupon, as they did in the bench, and report what they had done in the bench, where it was to be enrolled. If it happened, that the justices did not come into the country at all, or not at the day assigned, yet the parties and the jurors were to keep their day in bank (*d*); that is, the day of return of the *venire facias*, or *habeas corpora*, according as the inquest was to have been taken in the country, upon the one or the other.

(*a*) Ch. 3.

(*b*) The expression in the original is the same as in the former chapter.

(*c*) Vid. ant. 173.

(*d*) Ch. 4.

Complaint had been made, that the returns of writs by bailiffs of franchises were sometimes changed after they had come into the sheriff's hands. To prevent this, it was ordained (*a*), that an indenture should be made of such returns, in the names of the bailiff and sheriff: if any sheriff changed a return so delivered, and was convicted thereof at the suit of the lord of the franchise (should he have suffered any damage or scandal thereby), and at the suit of the party who had sustained any loss thereby, he was to be punished by the king, and yield double damages to the lord, and the party grieved. It was also ordained, that sheriffs and other bailiffs who received the king's writs returnable in court, should put their own names with the returns, that the court might know of whom they had such returns; and if the name was left out, the person neglecting was to be grievously amerced.

The last chapter (*b*) of this statute very wisely directs, in order to prevent the abuse of office, that no one who had the office of keeping the assises of wines and victuals should, while attendant on that office, deal in such articles. This act is deserving of notice, as it directs a method of prosecution which has since been adopted in many similar cases of breaches of a positive statute. It directs, that if any one was convict thereof, the merchandise should be forfeited to the king, and the third part of it given to the person at whose suit the trespassor was attainted. In such cases, a person who would sue for a thing so forfeited, was to be received; and the chancellor, treasurer, barons of the exchequer, justices of one bench and the other, and justices assigned to take assises, were to receive such complaints, *with writ or without*, and decide upon them.

These are the regulations made by the statute of York, which, like that of Lincoln, was transmitted to the sheriffs and justices for their direction, and also to the chancellor of Ireland, to be enrolled in the chancery there, and to be

(*a*) Ch. 5.

(*b*) Ch. 6.

sent to the different courts, and the several counties, to be observed in all points, the same as in England (a).

The statute of essoins, 12 Ed. II. st. 2. declares in one or two cases where an essoin should lie, and where not, and more particularly where the essoin *de ultra mare*, and *de servitio regis*, should be allowed; in all which this statute seems to be mostly a declaration of the common law (b). It declares, in conformity with the common law, that an essoin lay not where the land was taken into the king's hands (c), nor where the party was distrained by his lands; nor where any judgment was given thereon, if the jurors came; nor where the party was seen in the court (d). An essoin *de ultra mare* lay not where the party had before been essoined *de malo veniendi* (e); nor where he had essoined himself another day; nor where the sheriff was commanded *quòd faciat ipsum venire*. An essoin *de servitio regis* (f) would not lie where the party was a woman, unless she was a nurse, a midwife, or commanded by writ *ad ventrem inspiciendum*; neither did it lie in a writ of dower, because it seemed to be in deceit and delay of right: nor did it lie for that the plaintiff had not found pledges *de prosequendo*; nor where the attorney was essoined; nor where the party had an attorney in the suit; nor where the essoiner confessed he was not in the king's service; nor where the summons was not returned, nor the party attached, for that the sheriff had returned *non inventus*; nor where the party had been another time essoined *de servitio regis*, and had not put in his warrant; nor where

(a) Vid. Pickering's Statutes.

(b) N. B. The original and translation of this statute differ; some passages are transposed, and some which are in the latter are not to be found in the former: these differences are noted in Ruffhead's edition. I have followed the translation.

(c) Vid. ant. vol. I. 410.

(d) This was otherwise at common law. Vid. ant. vol. I. 410.

(e) Vid. ant. vol. I. 407. (f) For the cases where this essoin would lie at common law, vid. ant. vol. I. 410.

he was resummoned in an assise of *mortauncestor*, or *darrein presentment*, nor because such a one was not named in the writ; nor where the sheriff was commanded *quodd attachiet eum*; nor where the bishop was commanded to cause a party to appear; nor for that the term was passed. An *essoïn de servitio regis* was to be allowed after the *grand cape* and *petty cape*, and after a distress *per terras et catalla*, which latter is an exception from the general rule that was just before laid down concerning *essoïns* (a).

Of levying
fines.

The statute of Carlisle *de finibus*, 15 Ed. 2. like other statutes of this reign, is not a legislative act, but a writ directed to the justices of the bench, for their government in taking fines (b). It ordains, that all parties, whether demandant or plaintiff, tenant or defendant, who would acknowledge or render their rights or tenements to another, in pleas of *warrantia chartæ*, covenant, or other, in which fines were levied, should, previous to the passing of the fines, appear personally before the justices, so that their non-age, idiotcy, or any other defect, might be discerned and judged of by them: provided, that should any one, either by age or *impotence decrepit* (c), or some casual debility, be so oppressed and detained, as not to be able to come to court, then two, or one of the justices, by assent of the residue of the bench, should go to the party so diseased, and receive his acknowledgment in the plea, upon which the fine was to be levied. If there was only one justice, he was to take with him an abbot, a prior, or a knight, a man of good fame and credit; and these by a record were to certify the justices of the bench of the matter. Fines so levied were to have the same effect as was given to them when levied according to the directions of stat. 18 Ed. I. st. 4.

Respecting the appointment of attornies in general, it was ordained by the same instrument, that none of the

(a) Vid. ant. 303.

(b) Vid. ant. 224.

(c) *Ætate decrepitâ*.

barons of the exchequer, or justices, should admit any attornies, except only in pleas that passed before them and their companions, in bank, and in places where they might be assigned; the power of admitting attornies was denied to the clerks and officers of the barons and justices; and all admissions in future by such persons were declared void. There was a reservation to the chancellor and the chief justice of their authority to admit attornies, as formerly (*a*).

The *prærogativa regis*, 17 Ed. II. st. 1. is a parliamentary declaration of certain prerogatives which by law resided in the king, and which have been occasionally mentioned in the former parts of this History. To make the king's rights with respect to tenure, and some other royalties more generally and easily known, it was thought proper to bring them into one view in this statute, the contents of which are as follow.

It is in the first place declared, that the king has the custody of all lands belonging to those who hold of him *in capite per servitium militare*, of which the tenants were seised in their demesne as of fee, the day they died (of whomsoever they held else by the like service, so that they held of ancient time any land of the crown), until the heir came of lawful age; except the fees of the archbishop of Canterbury, the bishop of Durham between *Tine* and *Tees*, fees of earls, and barons in the marches, where the king's writs run not, and whereof the said archbishop, bishop, earls and barons ought to have the ward, though they held of the king in some other place (*b*). The king was likewise to have the marriage of an heir within age and in his ward; whether the land of such heir had belonged to the crown of long continuance, or came by reason of some escheat into the hands of the king, or he had the marriage by reason of the wardship of the lords of such heirs, without any

(*a*) Vid. ant. 284.

(*b*) Ch. 1.

respect to the priority of feoffment, although they held of others (*a*): all which seems to be only a confirmation of the common law, and of *Magna Charta* (*b*).

The king was to have *primer seisin*, after the death of such as held of him *in capite*, of all lands and tenements whereof they were seised *in their demesne as of fee*, of what age soever the heirs were, receiving the issues of the said lands and tenements, until the usual inquisition was taken, and till he had received homage of such heir (*c*). The king was to assign dower to widows, after the death of their husbands who held *in capite*, though the heir was of full age, if the widows pleased: and before assignment of dower, such widows were to swear that they would not marry without the king's licence, whether the heirs were of full age or not; and if they married without licence, then the king was to take into his hands, by way of distress, all such lands and tenements which they held of him in dower; though neither the king nor the wife was to take the issues of the lands, but he was to wait till she or her husband satisfied him by paying a fine. In the time of Henry III. this fine, says the statute, was at most one year's value of the dower. Moreover, all women, of whatever age, who held of the king in chief, were to swear not to marry without the king's licence; and if they did, their lands and tenements were in like manner to be taken into the king's hands till they redeemed them by fine (*d*). This provision, like the former, was only a confirmation of the law laid down in *Magna Charta* (*e*).

If an inheritance held of the king *in capite* descended to several parceners, all the heirs were to do homage to the king; and it was so to be divided, that every parcener should hold his part of the king (*f*). If a woman, during

(*a*) Ch. 2.

(*b*) Vid. ant. vol. I. 285. 238. 115. and ant. 208.

(*c*) Ch. 3. Vid. st. Marl. c. 16. and ant. 64.

(*d*) Ch. 4.

(*e*) Vid.

ant. vol. I. 240.

(*f*) Ch. 5. Vid. ant. vol. I. 259.

the life of her ancestor who held *in capite* of the king, was married before she was marriageable, then the king was to have the ward of the body of the same woman until she was of age to consent; at which time she might have her election whether she would continue with him to whom she was married, or accept a husband that the king would offer. It was declared, in confirmation of *Magna Charta*, that none who held of the king *in capite* by knight's service might alien more of his land than that the residue should be sufficient to answer his service, unless he had the king's licence for so doing; but this was not understood of the members and parcels of such land (a). As to the alienation of serjeanties without the king's licence, it appears, that the king had used to rate such serjeanties at a reasonable extent to be made of them, and on that foot it is left by this statute (b).

It was declared, that where another presented to a church that was of the king's advowson, and a suit arose thereon; if the king recovered by award of the court, though after six months from the time of the avoidance, that should not prejudice him, if he had presented within six months (c). Of this prerogative there is no mention in any writer before this statute, though it might be understood under the maxim of *nullum tempus occurrit regi*, which had prevailed in the reign of Henry III (d).

In the two following chapters the king's right to the custody of idiots and lunatics is declared. These prerogatives are not mentioned by Bracton; but we are informed by Fleta, that certain persons, called *Tutores*, used to have the custody of the lands *idiotarum et stultorum*. It is thought that these Tutors, as was natural, were the lords of whom the lands were holden; such unhappy persons being in a sort of perpetual infancy. But this sort of trust,

(a) Ch. 6. Vid. ant. vol. I. 239.

(b) Ch. 7.

(c) Ch. 8.

(d) Vid. ant. vol. I. 305.

according to Fleta, had been much abused; on which account an act had been made in the last reign, which is now lost, giving to the king the custody of the persons and inheritances *idiotarum et stultorum*, being such *a nativitate*; with a reservation to the lord of all his lawful claims for wards, relief, and the like (a). In confirmation of this statute it was now declared, that the king should have the custody *fatuorum naturalium*, of *natural fools*, taking the profits of their lands without waste or destruction, and finding them necessaries. This comprehended all persons, of whomsoever they might hold their fees. After the death of such natural fools, he was to restore the land to the right heirs, so that such persons might not alien, nor their heirs be disinherited (b). Thus far of *natural fools*, or *idiotæ et stulti*, mentioned by Fleta. From the manner in which that author expresses himself, it should seem, that in his time there was no provision of a similar kind for the protection of the persons and estates of *lunatics*. But now we find it enacted, that when any one, who once had his memory and intellects, should become *non compos mentis*, as those who have lucid intervals; in such case the king was to provide, that their lands and tenements should be kept without waste and destruction; that the person and his family should live and be maintained in a competent manner out of the issues thereof, and the residue be kept for his use, to be delivered to him when he recovered his memory. In the mean time, such lands and tenements were not to be aliened, and the king was to take nothing to his own use. If the party died in such state, the residue was to be distributed *pro animâ* by the advice of the ordinary (c).

The king's ancient prerogative to have the wreck (d) of the sea was declared, as also to have whales and great stur-

(a) Fleta, pa. 6.

(b) Ch. 9.

(c) Ch. 10.

(d) Vid. ant. 108.

geon (*a*) taken in the sea, or elsewhere within the realm, except in certain places privileged by the king (*b*).

In the twelfth chapter there was a provision concerning the escheats of Normans. King John was the last duke of Normandy; for, during his reign, that province was lost. King Henry III. as appears by the latter clause of this chapter, recovered several escheats of land within this realm holden by Normans; who, after they began to adhere to the French king, the king's enemy, and so were considered as traitors, forfeited all their lands to the king, of whomsoever they were held. If the king had given those lands to any other, he could not, according to the system of tenures now prevailing, grant (*c*) them to hold of himself, but of those of whom they were before holden; and so king Henry III. had made all his grants. It was now declared, that under such terms the escheats of Normans should continue to belong to the king (*d*).

It was declared, that where any one holding of the king *in capite* died, and his heir entered into the land, before he had done homage and received seisin, he should gain no freehold by such entry; and therefore, if he died seised during that time, his wife should not be endowed of such land, as had lately been determined in the case of Matilda daughter to the earl of Hereford, and married to Maunsel the earl marshal. He, after the death of William earl marshal of England, took seisin of the castle and manor of *Scrogril*, and died in the same castle before he had entered *by* the king, and done homage to him; upon which it was adjudged, that the widow should not be endowed, because the husband had not entered *by* the king, but *by intrusion*. But this same doctrine was not applied in socage, and other small tenures (*e*).

(*a*) Bract, 55. b.

(*b*) Ch. 11.

(*c*) Vid. ant. vol. I. 238.

(*d*) Ch. 12.

(*e*) Ch. 13.

It was declared, that the king should have escheats of lands belonging to freeholders of archbishops and bishops, if attainted of felony during the vacancy of the see, while the temporalties were in the king's hands; and that the king might make gifts of such lands, saving to the prelates the accustomed services (*a*). Respecting the king's grants, it was ordained, that when he granted lands, or a manor *cum pertinentiis*, without express mention, in the charter or writing, of knights fees, advowsons of churches, and dowers when they fell, belonging to such manor or land, it should be considered that the king reserved those things to himself; though it was held otherwise in the case of common persons (*b*).

Lastly, it was, consistently with the common law (*c*), declared, that the king should have the goods of all condemned felons and fugitives, wheresoever they were found. Their freehold was to be taken into the king's hands, who was to have the profits for a year and a day, with the liberty to waste and destroy its houses, woods, and gardens, and all manner of things belonging to the same land, excepting in case of persons in certain places privileged by the king. After the king had had his year, day, and waste, the land was to be restored to the lord of the fee, who might have had it before, if he had fined to the king for the year, day, and waste. The statute says, that in the county of Gloucester there was a custom for the lands and tenements of felons, after the year, day, and waste, to revert to the next heir, to whom they ought to descend, if the felony had not been committed: the same in Kent; where, says the statute, the maxim was, *the father to the bough, the son to the plough*. The custom of Kent was also recognised as to the descent of lands, namely, that heirs male should divide the inheritance, the same as women:

(*a*) Ch. 14.

(*b*) Ch. 15.

(*c*) Vid. ant. 21.

but that women should not divide (*a*) with men. Another part of their custom was, that a woman after the death of her husband should be endowed of a moiety; and that if she committed fornication in her widowhood, or took another husband, she should lose her dower (*b*).

Such are the prerogatives of the crown, which it was thought convenient at that time to ascertain and settle by a solemn declaration in parliament. It is probable, there were many other claims, which were either not generally admitted, or too well known to need any declaration of them at present.

There are two other statutes of the same parliament: one intitled, *Modus faciendi homagium et fidelitatem*; the other, *De terris Templariorum*, by which the lands and possessions of the knights Templars, whose order was then dissolved, were transferred to the knights of St. John of Jerusalem.

The *Modus faciendi homagium et fidelitatem*, 17 Ed. II. st. 2. prescribes the method of doing homage Of homage
and fealty. and fealty, much in the way that has been before stated out of Bracton (*c*). It directs, that when a free-man did homage to the lord of whom he held his chief mesuage, he should hold his hands together between the hands of his lord, and say thus: "I become your man from this day forth for life, for member, and for worldly honour, and will owe you faith for the lands that I hold of you, saving the faith that I owe unto our lord the king." If he did homage to any other than his chief lord, he was to add, "and to mine other lords." When he did fealty, he was to hold his right hand upon a book, and say, "Hear you, my lord R. that I P. shall be to you both faithful and true, and will owe my fidelity unto you for the land that

(*a*) This agrees with the common law-maxim delivered by Glanville; *Mulier nunquam cum masculo partem capit in hæreditate.* Vid. ant. vol. I. 110.

(*b*) Ch. 16.

(*c*) Vid. ant. vol. I. 277.

“ I hold of you, and lawfully shall do such customs and
 “ services as my duty is to you, at the terms assigned.
 “ So help me God and all his saints !” When a villein did
 fealty to his lord, he was to hold his right hand over the
 book, and say, “ Hear you, my lord *A.* that I *B.* from this
 “ day forth unto you shall be true and faithful, and shall
 “ owe you fealty for the land that I hold of you in villenage,
 “ and shall be justified by you in body and goods. So help
 “ me God and his holy saints !” It is probable, the above
 regulation was not a parliamentary act, any more than that
 in the 18th year of the king, called the statute for view of
frankpledge, which contains those articles of enquiry that
 were within the cognizance of that jurisdiction, as the *ca-*
pitula itineris did those within the cognizance of the eyre.
 The other statutes of this king relate to the *Despencers* and
Gaveston. One is for revoking an establishment of the
 household that had been made in the 11th year of this king ;
 another is the statute of *estreats*, 16 Ed. II. relating to the
 ordering of those matters in the exchequer.

Thus have we gone through the statutes that are by uni-
 versal consent ascribed to the reign of Edward II. At the
 end of these are thrown together in the statute-book some
 acts, the dates of which are not exactly agreed upon by
 lawyers, except that they were made either in the reign of
 Henry III. Edward I. or Edward II. for which reason
Statuta incerti they are classed under the denomination of
temporis. *Statuta incerti temporis.* As some of these
 must have had a very important effect at the time they were
 made, it will be proper to notice them, that such conse-
 quences as after followed from them may be ascribed to
 their true causes.

Among these statutes is the statute of *Ragman de justiti-*
ariis assignatis, by which particular justices were assigned
 to hear and determine in cases of outrage, trespass, barratry,
 and the like. This commission was probably the same as
 was called *Trailbaston*; and if so this statute properly be-

longs to the time of Edward I (a). There is another statute upon the subject of administering justice in the country, intitled, *Statutum de justitiariis assignatis*; which seems, from the recital at the opening of it, to have been passed very soon after the 13 Ed. I. as it was made in aid of the provision for taking inquests in the country by justices of *nisi prius*. This act states, that the justices of both benches, and the justices itinerant, had not time to come into the country at the seasons appointed by that act; and therefore the king, willing that justice should be administered with all dispatch, ordained eight justices to take assises, juries, and certificates, through the whole kingdom; for which purpose it was divided into four circuits. Two of these justices were to go into *Yorkshire, Northumberland, Westmorland, Cumberland, Lancashire, Nottinghamshire, and Derbyshire*; two into the counties of *Lincoln, Leicester, Warwick, Stafford, Salop, Nottingham, Rutland, Gloucester, Hereford, and Worcester*; two into *Cornwall, Devon, Somerset, Dorset, Wilts, Southampton, Oxford, Berks, Sussex, and Surrey*; two into *Kent, Essex, Hertford, Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, and Bucks* (b). Assises, juries, and recognitions of the county of *Middlesex* were to be taken before the justices of the court where the issue depended. These eight justices were specially to attend to taking assises and certificates *assidue per totum annum*, without any regard to the times prescribed in the before-mentioned statute, in any part of the county that seemed to them most convenient and proper; and no writs of assise, juries, or recognitions, were to be granted before any other justices, *nisi de speciali gratia regis* (c). It does not appear how long this establishment of justices continued.

(a) Vid. ant. 277.

(b) Vid. ant. vol. I. 55. for the distribution of the counties at the first appointment of circuits.

(c) Vid. ant. vol. I. 125. and ant. 286.

Another statute contains the oaths to be taken in the eyre by the sheriff, his bailiffs, the four hundredors, and the twelve jurors, much in the way in which they had been stated by Bracton (a). One of these statutes is intitled, *De magnis assisis et duellis*, though it has rather the appearance of a note penned by some lawyer, than a legislative act. It says, that battail, or the great assise, should not lie between relations till they had passed the third degree, whenever they claimed by the same descent; but battail might be joined between brothers when one was infeoffed, and the other claimed by descent (b). Battail might be joined, but there could be no great assise, where a man was infeoffed, and he vouched to warranty a charter which he had of his feoffor; for the vouchee might deny the charter *per corpus* of his free man; and in such case no great assise would lie. On the other hand, a great assise would lie, but not battail, where a man sold land to another, and that other sold it to another, and with it gave the charter by which he was infeoffed. After this the heir of the first feoffor came and impleaded him by writ of right: here he could not defend his seisin *per corpus* of his free man, but must put himself, says the statute, *upon God and the great assise*. However, neither the battail nor great assise would lie, where the demandant claimed to hold in frank-marriage, free burgage, or in gavelkind; nor would they lie where he demanded only a small thing, as an acre, or toft; but in such cases they might, by award of the justices, put themselves by consent on a jury of twelve free men, in lieu of the great assise.

A similar fragment of old law is intitled, *Statutum de visu terræ, et essionio de servitio domini regis*. This declares, that a view should not be granted in a writ *de custodia*, in a writ *de consuetudinibus et servitiis*, or in one

(a) Vid. ant. 3.

(b) Vid. ant. vol. I. 125.

de advocacione ecclesiæ, unless where there were more churches in one vill of the same saint; nor in a writ *de dote assignandâ*, or *nuper obiit* (a). Again, the *essoïn de servitio regis* was not to lie in a writ of novel disseisin, in a writ of dower *unde nihil, ultimæ præsentationis*, nor appeal *de morte hominis* (b).

The *statutum pro tenentibus per legem Angliæ* bears evident marks of an earlier period than this reign. In stating the law of ^{the} tenant by the courtesy, it says, that the second husband should inherit, contrary to the express declaration of the statute *de donis*, which altered the common law in this particular; it was therefore written before that act. Again, as it confines the courtesy to estates given *in maritagium*, according to Glanville, without including all inheritances, as Bracton does, it must have been written before the latter author penned his book. But if this was a statute before Bracton's time, that author, where he examines the question of the second husband claiming by the courtesy, and mentions *Segrave's* opinion against it, could not be supposed to omit noticing any statute that had been made so decisive as this is (c).

• The *statutum de catallis felonum* states the law respecting the lands and chattels of felons before conviction, in the same manner as Bracton. Among the statutes *incerti temporis* is one, intitled in English, *Articles against the king's prohibition*; being, in fact, a translation of the latter part of the statute of *Circumspectè agatis*, the substance of which, however, is in the former part of that same statute. Another is intitled, *Prohibitio formata de statuto articulo-rum*; being a writ of prohibition directed to the bishop of Norwich, or his official, with a view probably of enforcing the

(a) View was not allowed in *nuper obiit* at common law. Vid. ant. vol. I. 433.

(b) As to dower and *assisa ultimæ præsentationis*, this was a declaration of the common law. Vid. ant. vol. I. 408. As to the other points, vid. ant. vol. I. 409. 196.

(c) Vid. ant. vol. I. 298. 122. and ant. 165.

regulations made by the statute of *Circumspectè agatis*, which was made on the occasion of some proceedings in that bishop's court.

The remainder of these statutes are, *an ordinance for bakers; consuetudines et assisa de forestâ, sive articuli de attachiamentis forestæ; statutum armorum ad torniamenta; compositio ulnarum et perticarum; statutum de Judaismo; de divisione denariorum; an ordinance for measures; none of which are of any great moment. Statutum de brevi de inquisitionibus concedendo de terris ad manum mortuam ponendis*, has been supposed to belong to the 20 Ed. I. This act directs, that the writ of inquisition (by which was meant the writ of *ad quod damnum*) should not be granted for amortising lands, but that such alienations should be done only by petition in full parliament. We have seen (a) that this writ was afterwards authorised by parliament for this very purpose of aliening in mortmain.

Thus far of the statutes of this king, and of those *incerti temporis* (b); none of which, except that for the appointment of sheriffs, and that *de frangentibus prisonam*, seem to have made any very material alteration in the common law. They were either collections, and a sort of *summæ*, comprising in one view a number of particulars relating to one object, and necessary to be plainly understood, as the *Prærogativa Regis*; or declarations of the law in cer-

(a) Vid. ant. 230.

(b) Besides the statutes already mentioned, which are to be found in all the common editions of the statutes, there are about ten more, which have been omitted by later compilers, and are only to be seen in the edition printed by *Tottell*, which is the book usually quoted by lord Coke under the title of *Vetus Magna Charta*. These, like many of those we have just been mentioning, contain declarations of the common law, and have the appearance of being the notes of lawyers. They are, except one or two, of little importance, as may be judged from the titles of most of them. The titles are as follow: *Consuetudines Cantiae—Capitula Itineris—De Homagio capiendo—Contra Vicecomites et Clericos—Capitula Eschætriæ—Juramentum Regis—Juramentum Episcoporum—Juramentum Conciliariorum Regis—Juramentum Eschætorum—Juramentum Vicecomitum—Juramentorum Majorum et Ballivorum—De Divisione Denariorum—De Venditione Farinæ—Abjuratio et Juramentum Latronum:*

tain points that were entertained with some hesitation and doubt.

Having noticed the few regulations made by statute during this reign, we shall now see what was done by our courts. In this branch of our subject we shall circumscribe our inquiries, as we did in the preceding reign, confining our observations principally to such parts of the law as have not been hitherto sufficiently elucidated; and to such modifications of the old law, as had arisen from the operation of the numerous statutes made in the last reign; these, from their novelty, being intitled to a more particular attention.

Whatever might have been the doubt, in the time of Bracton (*a*), about the succession of the half blood, we find in this reign the rule of descent was established, conformably with what was laid down by Britton in the last reign (*b*), that the half blood should be entirely excluded in the succession to land. In the fifth year of this king (*c*), the following question was put to the bench by one of the counsel: What do you say to the imperial law (*d*), upon which the law of the land is founded, which ordains, that the heritage shall go to the most worthy; *quòd possessio fratris facit sororem hæredem?* to which the court assented; and in the same place it is stated, in the very terms of the law as held at this day, that if the brother dies, and the sister enters, the land shall rather escheat to the lord, than descend to another sister of the half blood: “and this (says “the book) is the common law, which ought not to be “changed.” Accordingly, in the case then before the court, they determined that the land in question should go to the uncle, and not to the sister of the half blood. This now became the law, as well in lands descended as those taken by purchase, respecting which we have seen there

(*a*) Vid. ant. vol. I. 310.

(*b*) Vid. ant. 246.

(*c*) 5 Ed. II. Mayn. 148. S. P. ibid. 628.

(*d*) *La ley impiel.*

was a difference in the time of Bracton (*a*). After this, the course of descent referred a claimant no further than to the person last seised; and it became the rule, without any exception, that *seisina facit stipitem*; that is, that the seisin of the last possessor was to be taken for presumption of his being of the blood of the first purchaser, without investigating a descent, which, in many cases, had become totally obscured by length of time.

It seems to have been very early taken for law, that warranty with assets would bar the issue in tail (*b*), but not warranty without assets: thus was a method already proposed of getting loose from the tie of an entail. But, notwithstanding this, there appear constructions upon the words and peculiar limitations of entails, which shew Gifts in tail. a prevailing inclination to extend the statute *de donis* to the utmost. Among others, the two following may be mentioned as strong instances: It was determined, that the heirs, as well as the first donee, were restrained from alienation; and that the word *heirs* was left out of the statute by mistake of the clerk (*c*). If the *heirs* of the donee were construed to be bound by the statute, there seems no reason to prevent this construction being carried still further, to the heirs of those heirs, and so on, *in infinitum*. Thus did the judges completely carry into execution a plan for rendering landed property, for ever after, subject to continue in the families to which it might happen to be disposed by persons living in the 13th year of Edward I. notwithstanding any future possessor might be ever so inclined to part from it.

In order to carry into complete effect the principle of this famous statute, it was found necessary to abrogate and dispense with many of the claims to which a person possessed of such an estate was liable at common law. Such seems

(*a*) Vid. ant. vol. I. 311.

(*b*) 4 Ed. 2. Mayn. 167.

(*c*) 5 Ed. II. Bro. Tail. 71.

to have been the determination in 5 Ed. II (a), where the second wife claimed dower out of an estate in special tail to her husband and his heirs by a former wife. In support of this claim it was contended, that the statute only restrained the tenant from alienation, but could not prevent the attachment of a lawful right. To this it was answered, that the tenant never had a fee in him, nor was any more than a joint feoffee; besides, the statute, which requires that the land should descend to the heir specified by the deed of gift, or revert to the donor, virtually took away this claim of dower, as a sort of alienation that would so far prejudice the issue. Such was the manner in which the claim was combated by those who best knew the law of those times. It may be presumption, upon the foundation of such scanty remnants of old law as we possess, to hazard any other reason than such as is here given; but we cannot help observing, that, as the law of dower stood in the times of Bracton, it seems very doubtful whether the second wife, in this case, would be intitled to dower. And when we consider the estate of a tenant by the courtesy (a claim that seems very analogous to that of dower), the doubts entertained in Bracton's time, and the removal of them by the stat. *de donis*, which declared that the second husband should not be tenant by the courtesy, there seems to arise a certain equitable construction, in this case, in favour of the heir, to relieve him from the second dower (b).

Probably, soon after Fleta wrote, the writ of *formedon in remainder* was invented; for we find one in the second year of Edward II (c). so that there was now the distinction, wherever an estate was to be limited over to any person but the donor, between a *remainder* and a *reversion*; and a *remainder* was considered as a technical term of limitation, altogether requisite in the wording of the do-

(a) Mayn. 139.

(b) Vid. ant. 165.

(c) Mayn. 40.

nation. Thus in the eighth year of this king (a) a question arose upon a gift of land in remainder to *J. S.* in tail, and for default of issue to *W. N.* *habendum* in tail: it was doubted whether this was good without some word importing a remainder; and it was held sufficient only by a strained construction, namely, that the former gift in remainder to *J. S.* was to be extended to both.

The most interesting part of that knowledge which is furnished by the reports of this reign, consists in the progress made towards bringing into form the remedies lately invented for redressing injuries to land or personal property. Of these we shall now give a short account, beginning with writs of formedon.

Writs of formedon became in this reign very common, being specific remedies to carry into effect the provisions of the statute *de donis*. These were of three kinds: one was a formedon *in descendre*; another, a formedon *in reverter*; another, *in remainder*. The formedon *in descendre* was ordained, and the form thereof given by the statute, which also speaks of the formedon *in reverter* (not indeed under that name, but by the description of a writ whereby the donor was to recover after failure of heirs) as common enough in the chancery; though, as we observed before, there is no mention of such a writ, nor probably did it exist, in Bracton's time. The form of a formedon *in reverter* differed from that *in descendre* only as the two cases differed. It was, *Præcipe, &c. quòd justè, &c. manerium de Bloxham cum pertinentiis, quod Robertus de Grelley dedit Petro de Grelley ad totam vitam suam, et quod Thomas filius, et hæres prædicti B. frater ejusdem Johannæ, cujus hæres ipse est, concessit Isolde de Grelley, habendum, post mortem prædicti Petri, eidem Isolde et hæredibus de corpore suo exeuntibus, et quod, post mortem prædictorum Petri de Isole, præfatæ Johannæ REVERTI debet, per*

(a) Bro. don. & rem. 38.

formam donationis et concessionis, prædictorum, eò quòd prædicta Isolde obiit sine hærede de corpore suo exeunte, &c. (a). The formedon *in remainder* was a writ that had originated since the statute, and was founded upon the distinction just mentioned, that had lately been made between a reversion, when to a donor and when to a third person; which in the latter case was now called a *remainder (b)*. The writ, therefore, in consequence of this distinction, used in such cases to allege *quæ REMANERE*, instead of *quæ REVERTI debet*. So early as the second year of this king, we find this writ to be a settled form of demanding land (c).

The formedon *in descendre*, as it came in the place of a mortauncestor (the only remedy which, before the statute, the heir *per formam doni* had) was in some points considered in the light of that writ. It was looked upon as a writ of possession; and, as such, it was held, the demandant must make himself heir to the person last seised (d). It was argued, that as it would be a good plea for a tenant in mortauncestor to say, that the person last seised died seised of nothing but a fee tail; so, in this writ, it would be good to say he died seised of a fee simple (e). This writ was held to lie for an infant as well as for a person of full age, not only because it was a writ of possession, of which any one might avail himself, but also, because it was expressly ordained by a statute, which makes no exception of persons within age (f). The general plea in this and the other formedons was, *ne dona pas*. It was once pleaded in a formedon *in descendre*, that the donor was not so seised as to be able to make a gift. To this it was objected, that there was no need of enquiring, in this action, about the seisin or title of the donor; and the tenant had nothing else to say but *ne dona pas*: the tenant accordingly

(a) Mayn. 473. (b) Ibid. 311. (c) Ibid. 40. (d) Ibid. 390.
(e) Ibid. 431. (f) Ibid. 16. 150.

amended his plea, and said, he could not make a gift *sans ceo*, that he was seised so as to confer a seisin; but it being still insisted, that the donor's title was not to be enquired into, one of the justices directed *ne dona pas* to be entered on the roll (a).

A formedon *in reverter* was also considered as a writ of possession; and therefore where it counted of a seisin so far back as the time of king Richard, as in a writ of right, it was held ill; and it was said, that it should be limited to the time of a writ of aiel or mortauncestor (b). However, though a writ of possession, it was held that an infant could not bring it, because it lay at common law, and was not ordained by statute, as the formedon *in descendre* was (c). A formedon *in remainder* was considered in the same light as the former. An objection was made to a writ of formedon *in remainder*, and the clerks of the chancery were sent to, who said, it was the usual form of the chancery to make the demandant in such writ heir to the person last seised, and to no other; but they could give no reason for it (d).

It was not unusual, in a formedon, for the tenant to plead, that an ancestor of the demandant aliened with warranty to such a person from whom the land descended to the tenant; and to argue upon this, that it would be absurd for the demandant to claim under the entail as against the tenant, when he was bound by the warranty of his ancestor to defend the tenant in possession of that very land against all the world. To this plea it was common for the demandant to admit the deed of his ancestor, but to say, that assets did not come to him by descent from his ancestor, therefore that he ought not to be bound by it; and if, upon trial of this issue whether he had any value by descent from

(a) Mayn. 506.

(b) Ibid. 37, 38. Vid. ant. 124, 125.

(c) Mayn. 389. Vid. ant. 166.

(d) Ibid. 625.

his ancestor, it was found that he had, the warranty was held a bar to the action, and otherwise not (*a*). That a warranty should bar the heir from claiming against his ancestor's deed, is perfectly conformable with the old law; and as the statute *de donis* had only declared that a fine should not bar, but seems to have left an estate tail open to the effects of a warranty, it was nothing more than a natural conclusion of law, that an estate tail, even after the statute, might be barred by a warranty; but the singularity is, that this warranty was restricted so as to lose its effect, if not accompanied with assets by descent.

We have before seen, that the heir of the warrantor at common law, was not bound *ad excambium*, but only in proportion to the lands descended to him from the warrantor; he was, nevertheless, bound to warrant, and, of course, was barred from claiming the estate, although he had no lands or assets, as they were now called, by descent (*b*). No statute, that has come down to us, was made expressly to change the law in this point. There seems no other way of accounting for this novelty, but by supposing that the judges thought themselves justified by the spirit of the statute *de donis*, to adopt the principle and regulation of the statute of Gloucester concerning alienations of tenants by the courtesy. This statute, proceeding as we have before surmised upon the common-law notion just mentioned (*c*), had declared that a warranty of the father should not bar the heir without an inheritance descending *ex parte patris*.

That they had an eye to the statute of Gloucester in their reasoning respecting entails and warranty, seems probable from the following case: A tenant *per la ley* had aliened with warranty, and his heir brought a *formedon*. To this a warranty was pleaded. In reply, the statute

(*a*) Mayn. 45. 564. 641.. (*b*) Vid. ant. vol. I. 447. (*c*) Vid. ant. 146.

was set forth; and it was alleged there was nothing by descent, therefore the warranty was of no force. To this it was objected, that he could not avail himself of that statute, because it was confined to the writs mentioned therein; namely, to writs of mortauncestor, ael, cosinage, and besael. But it was answered, that in like manner as another chapter of that statute, which gives the writ of entry *in casu proviso*, was construed to extend to alienations by tenant for life and *per legem*, though the statute only mentions tenants in dower; so on this chapter might any writ be maintained that was grounded on the alienation of the husband: and it was accordingly adjudged, that the writs named in the statute were only for examples, and that a writ of formedon, or right, would be equally good (a). Thus, if a formedon *in descendre*, which was specially assigned by statute for the issue in tail, was allowed as a remedy in a case within the statute of Gloucester, there seemed to be an affinity acknowledged between those two parliamentary provisions.

Indeed, when it is considered, that the statute of Gloucester was made in protection of the heir against the alienation of the ancestor, in case of a gift *in maritagium*, and of a tenant by the courtesy; that gifts *in maritagium* are one of the estates mentioned in the statute *de donis*, which statute was made expressly in favour of heirs; and that there is a special provision therein to protect the heir from being incumbered with the courtesy of a second husband; these two acts must be considered in the light of statutes *in pari materie*; and to be accordingly intitled to such reciprocal assistance as can be mutually communicated from one to the other, by construction. Whatever might be the ground upon which the courts proceeded, we find it decided so early as the second year of this king, that warranty with assets would bar the heir in tail, but not

(a) Mayn. 324, 325.

warranty without assets; and it is very explicitly declared in the next reign, as will be shewn hereafter, that this piece of law was by equity of the statute of Gloucester.

We are now enabled to see the nature and tendency of some other writs, which have hitherto been mentioned only generally.

There were at common law two writs for the recovery of the right of wardship; that called *De communi custodiâ*, and that *De transgressione*, for ejectment of ward; neither of which are discoursed of by any author of the preceding ages; but all the knowledge we have of them is derived from two statutes, which make some regulation for their conduct and process (a). One of those statutes ordained likewise the writ of *ravishment of ward*, Other real writs. which did not lie at common law. All these three writs were in use during this reign; and we are enabled, from some few decisions, to collect their distinct office. It seems the *writ of ward* was, in its nature, a writ of right, and was brought for the mere right, before any seisin of ward had been attained (b): in this action the defendant might pray in aid, and vouch to warranty, as in other real suits, but the process was that of distress (c). The writ of *ejectment of ward* lay where a seisin had been obtained, and the plaintiff had been ousted thereof; and, like the former, it lay both for the land and the body of the ward (d). The writ of *ravishment of ward*, which was given by the 2 Westminister, c. 35. (e) was only to recover the body; and this, like the former, only lay where there had been a seisin, and the plaintiff was deprived of his ward: it was held, however, that the defendant should not be permitted to traverse the seisin, but must plead the general issue of *ne ravist point* (f). This was an action of trespass as well as the former, and

(a) Vid. ant. 207, &c.

(b) Mayn. 378.

(c) Ibid. 213.

(d) Ibid. 376.

(e) Vid. ant. 207.

(f) Mayn. 378.

therefore it was thought that the writ should be laid *vi et armis*; and though it was said that it was a special writ, which by the form in the statute was only *contra pacem*, and accordingly one laid *vi et armis* had been once held ill, yet, upon reconsideration, it was determined to be good (a).

The writ of *cessavit per biennium* given by 2 Westm. c. 21. (b) was a very common remedy; being usually recurred to where there was a failure of distress. The pleading in this action was ordered in conformity with that for which it was in some cases a substitute (c). Thus, though a seisin of the services in question was alleged, it was not sufficient for the tenant to say *ne unque seisi* of the service, no more than in an avowry, but he was to answer to the tenure, or it would be taken for granted (d); so that the general plea was, *nous ne tenons rien de lui* (e). It was allowed, that the defendant might allege, by way of *protestation*, that the services were less than what were demanded; and for answer say, that there was sufficient distress upon the land (f). A *cessavit* being in the nature of a writ of right would not in general lie against a termor for life; and yet it was allowed, in such case, when the reversioner was plaintiff in the action (g). Consistent with the principle on which a view used to be denied at common law, it was denied in this action, because the cesser was the defendant's own act (h): though the aid of a parcener was refused (i), that of a reversioner was allowed (k).

There are several writs of *contra formam feoffamenti* grounded upon the statute of Marlbridge, c. 9 (l). The common plea in these was, *ne unque seisi*, before the time of limitation prescribed by that statute (m). There appears

(a) Mayn. 268. 191. (b) Vid. ant. 201. (c) Mayn. 361.
 (d) Ibid. 195. 560. (e) Ibid. 61. (f) Ibid. 534. (g) Ibid. 643.
 (h) Ibid. 38. 61. 195. Vid. ant. vol. I. 434. (i) Ibid. 38. (k) Ibid.
 245. (l) Vid. ant. 65. (m) Mayn. 51, 52.

a writ of a similar design with the former, which we have not met with in any of the preceding reigns, called a *monstravit*, but in after-times more frequently termed *monstraverunt*. This writ was at common law, and was contrived for tenants in ancient demesne, who had been burdened with more services than were originally due in that tenure. The litigation of these points generally produced an issue, which was to be determined by Doomsday-book in the exchequer; that being the evidence by which ancient demesne was to be proved (*a*). The first process in this writ was a prohibition (*b*), and then an attachinent.

There appear some few other new actions, grounded either upon the statutes of the two last reigns, or the common law. Of the former kind are the writ *de contributione*, on the statute of Marlbridge, c. 9. to compel coparceners to be aiding to the eldest in performing the services; on the statute of Gloucester, c. 7. the writ *in casu proviso*; a writ of entry, founded on 2 Westm. c. 3. for the heir of the reversioner, after a recovery against his ancestor by default; a writ *contra formam collationis*, on stat. 2 West. c. 41 (*c*). Of the latter kind are the following: the writ of *secta ad molendinum*, for recovering a suit to a mill, where a lord's tenants had been time out of mind bound to grind their corn at his mill, and any had withdrawn or ceased in making such suit; a writ of *quid juris clamat*, for a conusee in a fine levied by a reversioner to procure the attornment of the tenant for life; the writ of office called *diem clausit extremum*, grounded on the statute of Marlbridge, c. 16. Where a person died seised of land holden *in capite*, this writ issued to seize the land into the king's hands (*d*). The proceeding by *scire facias* had become very common, owing to the sanction that had been given to it by a statute in the last reign (*e*). The most usual in

(*a*) Mayn. 280. 455. (*b*) Ibid. 422. (*c*) Ibid. 101. 67. 91. 515.
Vid. ant. 65. 147. 191. 156. (*d*) Mayn. 81. 86. 304. (*e*) 2 Westm.
c. 45. Vid. ant. 189.

stances in which we find it, were to get execution of recognizances and of fines.

Writs of conspiracy.

The writ of *conspiracy*, which had been framed by the king's direction in the last reign (a), was put in practice as a mode of redress for parties who were injured by certain combinations and confederacies. One of the objects pointed out by the statute of Edward I. was evil procurers of dozeins. Under that idea this writ was sometimes prosecuted against indictors; and though in support of such writs it was argued, that a procurer of indictments had only to get himself impannelled on the jury, and then he would escape the imputation of *unlawful* confederacy, yet it was more than once held that it would not lie against indictors (b). It was endeavoured to extend this writ. A writ of conspiracy was brought against several for suing a false statute merchant, in order to encumber the land of the plaintiff. It was objected to this writ, that it was not within the statute of conspiracy; but there does not appear in the report any opinion of the court upon it (c). Again, this writ was brought against one person upon the following case: The defendant had brought a writ of entry against the plaintiff, which was adjourned during a certain time, upon agreement between the parties: the demandant in that writ returned to the court, without communicating to the tenant his design of going on with the suit, and, by surprize, recovered by default; upon which the tenant in the writ of entry brought this action of conspiracy against the demandant for redress. But it was held by the court, that this being transacted under the forms of law, could not be called a *false alliance, confederacy, and collusion*; therefore that the writ would not lie, but the party must seek redress by demanding the land back again in a writ of right (d). It was held, that a writ of conspiracy would

(a) Vid. ant. 239.

(b) Mayn. 401. 547.

(c) Ibid. 81.

(d) Ibid. 172.

not lie against women, though no reason is given for so singular an opinion (a). The count upon the writ used to conclude, *ad grave damnum ipsius W. et contra formam ordinationis, &c. unde dicit quod deterioratus est, et damnum habet ad valentiam*——, *et inde producit sectam, &c.*

(b). Where a writ was brought by a baron and feme, and the damages were laid *ad damnum ipsorum*, it was held ill

(c). In such a writ against conspirators for procuring an indictment, it must be alleged that the plaintiff was *acquitted*, otherwise it would be ill (d): it was held, that all writs of conspiracy should be laid against the statute.

A similar writ to the foregoing was the writ of *deceit*, of which we find no mention till this reign, though it was founded on the common law. This was to redress a person in damages for any injury he had sustained by reason of collusive, oppressive, or deceitful proceedings in judicial matters. It was brought for levying a fine falsely, and suggesting a false title; for suing a *monstravit*, where the plaintiff was not in ancient demesne; against the demandant in an action, and the sheriff for not summoning the tenant, so that he lost his land by default; against one for suing falsely in a writ of waste, and not properly summoning him, so that he lost his land (e).

We shall now view the improvement made in the more common personal actions then in use. We have seen, that the action of debt, in the reign of Henry II. was the remedy for recovering money, or a chattel (f), and that in the reign of Edward I. (g) this action began to split into two; so that a writ of *debet* was appropriated principally to cases where money was to be recovered, and a writ of *detinet* for recovery of chattels.

(a) Mayn. 509. (b) Vid. Mayn. 401. a record in conspiracy down to the award of the *venire*. (c) Mayn. 347. (d) Ibid. 509. (e) Ibid. 104. 214. 245. 587. 681. (f) Vid. ant. vol. I. 158. (g) Vid. ant. 261.

This distinction was still attended to; but the close affinity between these two modes of demanding was such, that they were sometimes included in the same writ. Thus we find an action *quòd reddat 20l. ARGENTI quas ei DEBET, et dimidium SACCI LANÆ quod ei injustè DETINET* (a). However, debt and detinue must be considered as two actions, and the specific differences shall therefore be treated of separately.

It seems that a writ of debt was usually grounded upon a *deed*, or *obligation* to pay money (which was a *writing sealed*); though it was sometimes upon a mere bargain of buying and selling: but so exact were they in their transactions at this time, that a deed was sometimes made for the price of a thing sold. In such a case the plaintiff would state his demand of so much money as the price of the thing sold, and then produce a deed testifying the transaction, and the debt (b). If the action was grounded wholly upon a deed of obligation, the plaintiff stated that the defendant granted himself to owe so much money, and then he shewed the deed testifying it: if it was a transaction without writing, then, after stating the demand, he would offer to produce his *secta*, or suit, to prove it. It was not uncommon to have a writ containing two demands; one grounded upon a deed, the other not; in which case the plaintiff, in counting, would produce the deed to prove one, and his *secta* to prove the other (c).

A deed made at Berwick was offered as evidence in an action of debt, but was objected to as not legal proof, because the place where it was made was out of the jurisdiction and process of the court (d). This objection was held good, and it was said to be the same of Chester and Durham, and *à fortiori* of Ireland and other places beyond sea (e). It was held, that a defendant should not be admitted to wage his law against a *specialty*, for so a deed was now sometimes

(a) 7 Ed. II. Mayn. 241.

(b) Mayn. 375.

(c) Ibid. 78. 188.

(d) Ibid. 24.

(e) Ibid. 613.

called; and though it was endeavoured to bring a sealed (*a*) tally within the same reason, it was over-ruled; yet at the same time it was admitted, that in *accompt* against a bailiff or overseer, he would not be allowed to wage his law against a sealed tally (*b*). The reason of the difference is not stated in the report, nor does it seem easy to account for it. The proper general plea against a deed was, *nient le fait*, that it was not the defendant's deed. So strictly was this form adhered to, that where it was pleaded by an abbot, *nest pas l'our commune seale*, that it was not the common seal of the convent, he was driven to say, *nient le fait* (*c*). A common plea to a deed was *deins age*, not of age, when made (*d*). In an action of debt brought upon an obligation to pay so much money, if a book was not returned by such a day, it was pleaded that the book was deposited at such a place, and the plaintiff took it *ante diem*; to which it was replied, he did not take it (*e*).

Respecting joint and several actions; a husband brought an action of debt in his own name only, upon an obligation made to his wife while sole, and it was held good; because if she had been joined, *she* would have recovered the money, and so have had a property which she ought not by law to possess, while under coverture (*f*). It was laid down as a rule long settled, that executors, when plaintiffs, should all be named in the writ; but when a writ was brought against executors, none need be named but those who had administered (*g*). The way of demanding against executors was somewhat different from that against the original debtor; it was, *quæ prædictus Thomas ei DEBUI, et præd. executores injustè DETINENT* (*h*). The general plea of executors was, *pleinment administre*; to which the replication was,

(*a*) Vid. ant. 253. (*b*) Mayn. 178. (*c*) Ibid. 589. (*d*) Ibid. 369.
 (*e*) Ibid. 379. (*f*) Ibid. 93. (*g*) Ibid. 503. (*h*) Ibid. 490.

assez de biens le mort (a): that of an heir, when sued on an obligation in which his ancestor had bound his heir, was, *riens per descent*; to which the replication was, *assez jour de brief purchase*; to which it was rejoined, *navoit rien le jour du brief purchase* (b).

If there was no writing to prove the demand, the plaintiff was to produce his *secta*, according to the old law; though it seems there was not now so much reliance upon the *secta* as formerly. In the 7th of Edward II. it was demanded by the counsel for the defendant, that the *secta* should be examined, as was the method, we have seen, in former reigns (c); but the counsel for the plaintiff objected to it, that *this court* (meaning the common pleas) never suffered a *secta* to be examined: however, he said he was ready to *aver* the debt, that is, to *prove* it by the verdict of a jury; for such was an averment: and upon one of the justices shewing some doubt about examining the *secta*, the averment was received, the defendant pleaded *riens lour DEUST, nil debet*, and it went to the country for trial (d). The suit, however, still continued to be brought, though their examination might be disused. In the 14 Edward II. the plaintiff being asked what he had to shew for his debt, said, *a good suit*; upon which the counsel for the defendant prayed they might come to the bar, which they did; and then he tendered his averment *que riens, &c.* that he owed nothing (e). The wager of law continued as a proof not only upon the issue of *nil debet*, but on some collateral points. An action of debt was brought upon a specialty, and it was pleaded, that the obligation was to be void upon the defendant levying a fine after reasonable request, and no request was made. To this it was replied, that request was made at such a time and place; to which it was

(a) Mayn. 354.

(b) Ibid. 585.

(c) Vid. ant. vol. I. 377.

(d) Mayn. 242.

(e) Ibid. 420.

rejoined, that he made no such requests, which he was ready to prove *par notre ley*, by wager of law (a).

We find actions of debt were brought upon three statutes made in the last reign; one upon 2 West. c. 11. (b) against a keeper of a gaol for letting an accountant go at large (c); another on the statute merchant for letting a debtor by recognisance go at large (d); another on 2 Westm. c. 19. (e) which directs, that the ordinary should be bound to answer the debts of the deceased, as the executors should have done. There was an action against the executors grounded upon this statute, which after some debate was held good: the plea in such actions was, *non devindrent en mains l'ordinaire* (f).

Thus far of the action of debt: that of *detinue* next claims our notice. This might be brought, as was before said, for any chattel that was in the hands of the defendant, and belonged to the plaintiff: but as, in the former writ, it was necessary in counting to shew *how* the money was owing, so in this it was required to shew in what manner the thing in question came out of the possession of the plaintiff, and into that of the defendant. This was generally stated to be by a delivery by the hands of the plaintiff, or of some other by his authority, or through whom he claimed, or upon some of the terms mentioned at large by Glanville (g), as a loan, deposit, or the like. As this was the material part of the enquiry, it had become a rule of pleading, that the defendant should not be admitted to deny, or *traverse*, as they called it, the *detinue*, but should answer to the *delivery*, or *bailment*, that the court might be informed, whether the thing came to the defendant's hands by the bailment of the plaintiff himself, or by the

(a) Mayn. 433, 434.

(b) Vid. ant. 179.

(c) Mayn. 341.

(d) Ibid. 138. Vid. ant. 158.

(e) Vid. ant. 167.

(f) Mayn. 490.

(g) Vid. ant. vol. I. 159.

hands of some other (*a*). There was a particular reason why the plaintiff should state whether the bailment was by his own hands, or by those of another; because in the latter case it was not sufficient to bring a *secta*, but he must ground his action upon a specialty, otherwise the defendant need not answer it (*b*). Thus, then, the plea in this action was, *ne bailla pas, or n'avoit pas de son baille* (*c*). In this action as well as in others, they went sometimes into a length of pleading which put the inquiry upon another matter; as where it was pleaded that the plaintiff accepted ten acres of land in satisfaction of the goods demanded, and the plaintiff replied, that he was not enfeoffed in satisfaction of the goods now demanded (*d*).

Detinue de rationabili parte.

There are two instances, where this action, or at least that of debt, was brought, which deserve particular notice. In the first year of this king, a writ, in the *detinet*, was brought by a son against his father's executors for ten marks of the property of the deceased, who died worth thirty; alleging, that, because *pur usage de pais, by the custom of the country*, the third part ought to go to the deceased, a third to his widow, and a third to his children unmarried, therefore he, as son, demanded his third. To this it was pleaded, that he had been advanced by a lease of lands from his father of such value, and therefore the action would not lie. The plaintiff admitted this in his replication, but said the land was worth only so much, and therefore he ought to maintain his action; however, it was decided against him, as this action was grounded wholly upon usage and want of advancement: so that this writ, notwithstanding what was argued, as to the declaration of *Magna Charta* (*e*), which was contended to be general and absolute, was held by the court to be founded on the *particular custom* of a cer-

(*a*) Mayn. 545.

(*b*) Ibid. 39.

(*c*) Ibid. 78.

(*d*) Ibid. 198.

(*e*) Viz. ch. 18. Vid. ant. vol. I. 243, 244.

tain place (a). Again; we find, in the 17th year of this king, a writ of detinue of chattels was brought by an infant against his father's executors, reciting, that *per consuetudinem regni*, the mother was to have a third, the children a third, and the executors another third, &c. To this the defendant pleaded *pleinment administre*. One of the justices took up the matter, and expressed a doubt whether the action would lie; for, says he, the writ is founded on a custom, but we know no such custom, and the law is otherwise: and when it was urged that the custom was good, as appeared by *Magna Charta* in these words, *salvis uxori et pueris suis rationabilibus partibus suis*, he replied, that the Great Charter only saved to the children their *own* goods, which might happen to come into the hands of the father; but neither the Great Charter nor the common law restrained the father's power over his own effects, to give or devise them as he pleased. It was added by another, that he had often seen such writs, but never knew one of them maintained; so the plaintiff was nonsuit (b). This was the opinion in the reign of Edward II. respecting the power of bequeathing, where a wife and children were left by the testator. These two cases may be construed as a clear confirmation of the law, as laid down by Glanville. The latter, which applies to the general law of the kingdom, certainly supports that author's declaration, *quòd ultima voluntas esset libera*. The former may be thought to explain the other passage in Glanville, which qualifies, if not contradicts, that general rule; and may, perhaps, serve to shew that Glanville should there be understood to speak of certain local customs; which interpretation, however, does not seem warranted by the present state of that author's text (c).

The most common subjects of actions of detinue were deeds and charters. This was owing to the mode, then in

(a) Mayn. 9.

(b) Ibid. 536.

(c) Vid. ant. vol. I. 111, 112.

fashion, of assuring land. It was a common practice, when land was let for years, or other estate less than the inheritance, to make a charter of feoffment, and bail it to a third person, as a sort of trustee, who was to return it if the termor enjoyed his term without molestation; and upon any molestation the feoffment was to be absolute. Another way was, to make mutual obligations for performance of covenants, and deposit them in the hands of some third person, with a power, if one of the parties broke his part of the covenant, to deliver his obligation to the other who had suffered by the breach (*a*). These deeds, if the purpose of them had been served, or they became forfeited, used to be demanded in actions of detinue, in which the merits of the detainer were discussed.

The actions of *covenant* that occur in this reign are either for land, or some profit or casualty issuing out of, or appertaining to, land. It was laid down, that this action was appropriated for the recovery of a fee simple or term, and that even a fee-tail had been recovered in an action of covenant (*b*); this, however, must have been before the statute. It used to be brought for not doing homage and service; not acquitting the lessor against demands which ought to have been provided for by the lessee; against the lessor for ousting the lessee; and the like. It seems to have been always founded upon some deed containing covenants.

The writ of *annuity* was frequently recurred to. This action was very common between ecclesiastics. The heads of religious houses would grant to clerks annuities, to continue till they presented them to some of those benefices with which they were plentifully endowed. Again, when they performed their promise by presenting, it was not uncommon, if the living was greater than the annuity, or than they meant to bestow, to stipulate with the clerk for

(*a*) Mayn. 513. 554. b.

(*b*) Ibid. 603.

a grant of so much money annually, to reduce it to the value they thought proportioned to his merit (a). In the latter sort of annuities it was no uncommon plea to allege, that the subject matter was of a spiritual nature, and therefore not proper to be discussed *in foro seculari*; but this plea was always over-ruled (b).

The proper way of counting upon a writ of annuity, if there was no deed, was, after stating the title and grant, to allege a seisin by the hands of the defendant; or, if it was so old, by the hands of his predecessor, or ancestor, according to the grant; and also by the hands of the plaintiff; and, if the case was so, by the hands of his ancestor, or predecessor, likewise. The plea to this was, *nient seisi* (c), and the replication, *seisi per le mains le donor, &c.* such a time *avant le jour le brieve purchase* (d); the title and the seisin coupled together, being the ground of action. If an annuity had been granted before time of memory, it was held that a deed was not necessary, but that it was good by prescription (e). Annuities were sometimes granted with a clause of distress. It had been endeavoured to make such circumstance a plea in bar of an action of annuity, alleging that the plaintiff had another remedy; but this plea was always over-ruled (f). When a writ of annuity was brought against a parson, he alleged, that, as it was charged upon his benefice, he ought to have the aid of his ordinary; which was granted (g). A defendant was not allowed to wage his law in an action of annuity (h); probably because it was upon a deed, or a prescription, that was held equivalent, and supposed a deed once to have existed.

The writ of *accompt*, as it had been aided with a more effectual process by the statute of Marl-bridge and Westm. 2. was rendered a very useful remedy

(a) Mayn. 224. 416. (b) Ibid. 634. (c) Ibid. 221. (d) Ibid. 205. (e) Ibid. 665. (f) Ibid. 8. (g) Ibid. 416. 524. (h) Ibid. 309.

against persons who acted as agents; and so became, either by bailment or receipt, possessed of the goods, or money arising from the goods, of another. The object of this writ was to bring the party *to account*, and for that purpose auditors were to be assigned. The persons who were the objects of this remedy, as they had violated a trust of great confidence, and often of great magnitude, were subjected to a shorter process than any others who had broken a mere civil engagement. They alone, of all other defendants in suits purely civil, were liable to a process against their person (*a*); but the legislature had proceeded with tenderness in allowing this process. The statute of Marlbridge (*b*) gave it only against a man's *bailiff*; which term, though since understood in a very large sense, did at that time, probably, mean no more than a person who was a hired servant; and then it was to be only where the bailiff had no lands by which he might be distrained. The stat. Westm. 2. (*c*) went further, and extended it to all *servants, bailiffs, chamberlains*, and all manner of *receivors, who were bound AD COMPOTUM REDDENDUM*; but still it was only to issue in the case of a defendant having no lands, as directed by the former statute. We find the writ of *monstravit de compoto* made use of in this reign, promiscuously with the common *capias* (*d*) (for so the *habeas corpus* and other writs against the person were now termed, from the word *capias* being introduced in the place of *habeas*, in the command to take the body); and it was a good objection in either case to say, that the party had land, and therefore ought not to be taken (*e*); though if he had not lands where the receipt was alleged to be, the writ would still lie. After these statutes, it was usual, in order to have the bene-

(*a*) Of this subject, and the statutes concerning the process of *capias*, more will be said when we come to speak of stat. 25 Ed. III. st. 5. c. 17. which gave this process in debt and detinue.

(*b*) Viz. Ch. 23. Vid. ant. 73.

(*c*) Ch. 11. Vid. ant. 178.

(*d*) Mayn. 94. 99. 665.

(*e*) Ibid. 99. 186.

fit of them, to charge defendants either as *bailiffs* or *receivors*. It was sometimes objected, that the *monstravit* would not lie against a *receivor*, because the statute of Marlbridge speaks only of *bailiffs*; but it was said, and so adjudged, that the writ would be good, at least by Westm. 2. which spoke of *receivors*; for this latter statute was to be considered as having relation to the statute of Marlbridge, and therefore, that the two statutes should be construed together as one; so that these writs, which had become very common, were determined to be good under either statute (a).

If the defendant was charged with being *receivor* of certain money belonging to the plaintiff, the plea might be, *ne unque recievour* (b). If the count charged him as *receivor* of such money, and also with certain goods which were *bailed* to him; to the first he might plead generally, *non receptor*; to the second, that he had accounted (c). The following instance of a special plea and replication is well worthy of notice: The defendant said, that he was employed by the plaintiff to buy things at market, of which he every day gave an account, and delivered to him the escrows of the expences, and in this and no other way was his *receivor* or *bailiff*; and demanded judgment, whether of such receipt and administration, of which he had rendered account, he ought to answer, &c. To this it was replied, that he was *receivor* in the manner above alleged, *sans ceo que*, that he had rendered account (d). This phrase of *sans ceo que* was merely a denial, as *come ceo que* was an affirmation; and they respectively corresponded with *absque hoc quòd* and *cum hoc quòd*, two phrases that were thoroughly rooted in the law Latin of those days; that of *absque hoc* and *sans ceo* becoming technical expressions to signify a denial or *traverse*, in pleading.

(a) Mayn. 41. 94.

(b) Ibid. 89.

(c) Ibid. 151.

(d) Ibid. 386.

It was a general plea to say, *ne unque recievour* (a). Where part of the action was founded upon a deed, and part upon a *secta*, the plea to that upon the deed was, *pleinement account per patriam*; to the latter, *nient son recievour per legem* (b). To this, as to all other actions, an acquittance might be pleaded (c). We find an action of account against a guardian in socage, grounded on the statute of Marlbridge, c. 17 (d). This writ recited the statute, as was usual in writs warranted by statute only.

Action of
trespass.

Very little has yet been said on the action of *trespass*; all the writers of the former periods being wholly silent as to the nature and extent of this remedy. We are informed by Bracton, that there was a writ *quare vi et armis* any one entered into the land of another, and we have seen the opinion expressed by that writer upon it (e). There is a record of the reign of Edward I. (f) which shews that this writ lay also for cases of personal injury, and for taking of goods and chattels: the writ there mentioned containing a complaint of both. In the present reign we find writs of trespass of various kinds; for *battery, imprisonment, taking and carrying away of goods and chattels, breaking and entering lands or houses, rescuing a distress*, and the like cases of violent injury. The manner in which the defendant answered to these suits was, by pleading not guilty, if he could deny the *fact*: if he admitted the fact, but could say what would justify him in doing it, he then stated such matter specially. Thus, in an action for imprisoning the plaintiff, he might say, that he was seised of the plaintiff as his villein, and took him as such; then the plaintiff might traverse, that he was seised of him as his villein: or he might plead he took him on suspicion of killing (g). Though the special matter of justi-

(a) Mayn. 80. (b) Ibid. 590. 651. (c) Ibid. 589. (d) Ibid. 487. Vid. ant. 64. (e) Vid. ant. vol. I. 338, 339. (f) Vid. ant. 264. (g) Mayn. 412. 344.

fication was usually to be pleaded in a special way, yet where a defendant pleaded not guilty; and the jury found *son assault demesne*, judgment was given for the plaintiff, the same as if he had pleaded it (a). In trespass for taking and carrying away the goods and chattels of the plaintiff, he might justify as parson, and that he took them for tythes; if for cutting trees, that he had right of estovers; if for rescous, that they were *blada crescentia*, and so not liable to a distress; if for goods, that he took them as guardian in socage; if for driving away cattle, that he took them for services due; if for entering land, that it was his own soil and freehold; if for beating down a mound, that it was a nuisance, and he beat it down while it was freshly raised (b).

To such and the like pleas of justification the plaintiff was to reply, by denying the very point upon which the defence was rested. As thus: To a plea of taking for tythes in the fee of *L.* the replication might be, that he did not take in the fee of *L.* but in the fee of *C.*; to a justification in right of estovers, that they were not appendant to his freehold; to a plea of distress for services, replication *a force et armes, et nient per tiel cause*; to a nuisance *freshement* raised, replication that it stood a year and a day before it was beat down; to the plea of *our soil and freehold*, and title set forth, the replication was, *our soil, and not his* (c); and so on.

In an action for beating down a dove-house, the defendant pleaded that it was within his soil and freehold, and demanded judgment if he should answer for abating any thing in his own demesne. This sort of pleading was objected to on the other side, as *freehold or not freehold* could not come in issue in an action of trespass. The plaintiff contented himself with averring his declaration: but the

(a) Mayn. 381.
400. 422. 458.

(b) Ibid. 12. 22. 63. 135. 198. 302. 312. 326. 340.
(c) Ibid. 63. 302. 400. 422. 458.

defendant then set forth his title; after which the plaintiff was driven to reply to the special matter, thus, *that the defendant beat down the plaintiff's dove-house, in the plaintiff's soil, and not in the soil of the defendant*; which issue went to the jury (a): and so it seems to have been settled, that the freehold of the plaintiff or the defendant was a good issue. When this was agreed on, it must be seen, that many injuries to land, which used in the reign of Henry III. to be tried in the assise, might be *contested* in an action of trespass.

In the time of Bracton, every injury that intrenched upon the free enjoyment of a man's freehold was considered as a disseisin, and became of course the subject of an assise. The prejudices of the time were greatly in favour of that remedy, leaving it to the nature of the case, whether the point in dispute should be finally determined on, as a disseisin, or the assise should be turned into a jury, to consider it as a trespass. The action of trespass was rarely brought; and, considering the above application of the assise, was not necessary. It was upon this idea, probably, that Bracton disapproved of the action of trespass, as a writ by which the *mode* of the fact was to be inquired of instead of the fact itself (b). In the time of Bracton most of the cases above mentioned would have been inquired of in an assise, modified in that way; but they had now, by the change in legal opinions and practice, become the objects of an action of trespass. When this change happened, it was thought, that the allegation of *freehold*, which was a good answer in the assise, ought to be a good plea in the writ of trespass, that was substituted in its place; and those, on the other hand, who adhered to the prejudices expressed by Bracton, might very consistently contend, that *freehold or not freehold* would not be a proper issue in an

(a) Mayn. 458.

(b) Vid. ant. vol. I. 338. 339.

action which was not for the recovery of a freehold, but merely to inquire of the *mode* and degree of a trespass upon it.

In this multiplication of remedies, assise and trespass were sometimes both brought for the same cause of action: in such an action of trespass, being for entering a house, and taking goods and chattels, and cutting trees, it was pleaded that an assise was depending for the same land; and that because damages would be given in the assise for taking the goods and cutting the trees, the writ of trespass ought not to lie (a).

As a *capias* and process of outlawry lay in an action of trespass, there was a temptation to recur to this writ, in preference to an assise: but yet the process of *capias* was under some check; for upon a return of *nihil habet* on the *distringas*, the *capias* did not use to issue without a special application to the court to award it (b). Aid used to be granted in this as in real actions. In an action against a man for cutting trees, on the defendant pleading a right of estovers, and the plaintiff replying *non appendant*, and that issue being to be tried, the plaintiff *prayed aid* of his wife, because he held the land in her right; and it was granted (c).

We find some actions of trespass of a particular kind. There is mention of a writ of trespass brought by the king on a *cepit et asportavit*; to which it was pleaded, that the defendant and his ancestors had had wreck there from time to which the memory of man runs not to the contrary. To this they replied,—not seised before time of memory; on which issue was joined (d). An action of trespass on the statute of Marlbridge, c. 28. by a prior for goods taken during the vacancy of the priory. To this it was objected, that it should be *detinue*, and not *vi et armis*; but the writ was held good (e). Another upon the statute *De districtione*

(a) Mayn. 272.

(b) Ibid. 478.

(c) Ibid. 302.

(d) Ibid. 435.

(e) Ibid. 109.

scaccarii (a), for distraining beasts of the plough. An action grounded upon the statute of Marlbridge, c. 15. for distraining in the highway, seems not to be trespass, but a special action reciting the statute (b). Thus far of the action of trespass, of which more will be said in the subsequent reigns. The common form of commencing a plea in trespass, if any title was to be set out, was to deny the force and arms, and then shew the special matter of justification; "and says, that as to his coming with force and arms, and "whatever is against the peace, he is not guilty; but as "to the cutting and carrying away of the trees," &c. &c. and so stating the justification. This is all that appears necessary to be said respecting the progress of opinions and practice during this reign. Before we add some few observations upon the changes in the criminal law, we shall lay before the reader a juridical curiosity of a new sort.

It has been before intimated, that the counting and pleading in actions was all transacted *vivâ voce* at the bar; but the method in which this passed we have not been able to observe till this reign, when we meet with the first *report* of proceedings in court. From this we may form some judgment of a legal disputation (for so the pleading in a cause seemed), and the style in which it was *moderated* by the judges. We shall now give some specimen of this, with all its formality, strictly adhering to the original report.

The first shall be of an action where several pleas in abatement were over-ruled, and at length the general issue was pleaded. The prior of *Lenton* brought a writ of trespass, grounded upon the statute of Marlbridge, c. 28. (c), against the parson of *Bangor*, &c. *quare vi et armis bona et catalla domûs et ecclesiæ ipsius prioratûs ad valenciam, &c. ad grave damnum, &c. et contra pacem nostram, &c.* upon which he counted, that he took some wool and lambs. Upon this

(a) Mayn. 583. Vid. ant. 61.

(b) Mayn. 624.

(c) Vid. ant. 73.

Herle, one of the counsel for the defendant, demanded judgment of the writ, for there was no *one* form of a count for *live* and *dead* chattels; and if he had wanted to count of lambs taken and carried away, he might have said in his writ, *quare AVERIA sua cepit et abduxit*. To this *Brab.* (a) one of the judges, says, he has counted of wool and lambs, which can be as well *carried* as *chased*, therefore *respondeas ouster*. Then *Herle* (taking another ground) said, Again we demand judgment, because he says, *bona et catalla domus et ecclesie*, &c. whereas by right the property of the chattel is not in the church, but in the prior, therefore judgment. To this *Malm.* for the plaintiff, said, Our writ is given by statute, and we have followed the statute; which was assented to, and so another *respondeas ouster* was awarded.

Then *Pass.* (another counsel for the defendant) said, Again we demand judgment of the form of the writ; for the statute says, that a man should have recovery *ad bona repetenda*, and therefore the prior ought more naturally to have a *præcipe quod reddat* of *detinue* of chattels, or *replevin*, and not this writ, which goes wholly for damages. What then, says *Malm.* if the chattels were dead or aliened, should I have no recovery? and there was another *respondeas ouster*.

Again, says *Herle*, This writ is given by statute to successors after the death of their predecessors, against whom every action for recovery of any thing ought to be brought; and we say, that the *prior William*, in whose time, &c. is still alive, and therefore we demand judgment of the writ. *Malm.* says, He is dead as to this action, for he is deposed, and so the action as against him is extinct; and if I was to bring an assise *quis advocatus*, &c. *ultimam*

(a) The names of the judges and counsel in the year-books are generally abbreviated, if consisting of more than one syllable. I cannot find any name like *Brab.* or *Malm.* in the *Chronica Juridicalia*. *Pass.* stands probably for Serjeant *Passelegh*. Vid. *Chron. Jur.*

personam, &c. quæ mortua est, &c. though the person in question was alive and at the bar of the court, yet if he was no longer parson, the writ would be good: and (continues he) put a case that a husband aliened land of the right of his wife, and then was outlawed, and his wife brought a *cui in vitâ*; though the husband was actually alive, yet being dead in law, the writ would not abate. Then *Roub.* (one of the justices) said, If an abbot brought a writ against an abbot, and the defendant was deposed pending the plea, the writ would not abate; but it is otherwise where such an abbot was plaintiff, for then all cause of action ceased, and therefore he held the writ good in this point: and there was another judgment of *respondeas ouster*.

Again, *Pass.* demanded judgment of the writ, because it was a writ of trespass *vi et armis*, for a wrong done to divers persons; and the statute does not give a recovery of damages, but only *ad bona repetenda*. But *Malm.* argued, the writ was good as it now stood, for two reasons: first, because the trespass was done in the time of our predecessor, for which trespass we are entitled to our action by the statute: secondly, because of the detinue in our time. *Herle.* Your writ has nothing to do with detinue of chattels, but is of a fact done with force and arms to another person; so that the king would be entitled to a fine for a trespass done in the time of his predecessor. *Malm.* (repeating what he had before urged) Suppose the chattels were dead or eloigned, I could not recover the things themselves, and then my action must lie in damages, or I should have no recovery at all. *Herle.* Yes, you might recover the value, &c. Then *West*, one of the justices, interposing, said, The force of their *objection* is, that a man shall not recover damages for a trespass done to another; and yet executors may recover damages for a trespass done to another: again, if waste is done in the time of my father, I shall have an action for the waste and trespass, &c. In regard to the first of these cases, it was observed, that the

executors recovered not in their own right, but in right of another; and as to the second about waste, that it was by statute, and not by the common law. However, *Roubury* (another justice) said, they were all agreed that the writ was good, and therefore awarded another *respondeas ouster*; upon which the defendants pleaded *the general issue*, that they did nothing against the peace, *prest, &c. et alii è contra*, and so issue was joined (a).

In the above case, where there were so many pleas in abatement, as they were all over-ruled at the instant, they must be considered as successive *amendments*; and none of them were entered on the roll, but only that plea which was finally approved and relied on, namely, the general issue.

The following is an action where they went on to reply, rejoin, and surrejoin. The case was this: *Aleyne de Newton* brought his writ of annuity against the abbot of *Burton* upon *Trent*, and demanded 30*l.* arrears of an annual rent of 45*l.* per ann. and he counted that one John, abbot of *Burton*, and predecessor of the present, did, by assent of the convent, grant an annuity to *Aleyne*, payable twice in the year, till he was advanced to a convenable benefice; and he exhibited a specialty containing, that the abbot by assent, &c. did grant an annuity to *Aleyne de Newton Clerk*, in the above manner, as he had counted. Upon this *Willuby* (as counsel for the defendant) prayed judgment of the writ, because of the variance between the writ and the specialty; for in the writ he was named *Aleyne de Newton*, but in the specialty, *Aleyne de Newton Clerk*. *Ward* said, that it was no variance; yet *Willuby* maintained, that as he might have had a writ agreeable to the specialty, if he varied in his own purchase of it, the writ would be ill; but he could in this case have a writ agreeable to his specialty. *Ergo, &c.* And again, as far as appeared by the specialty, it was made to some one else, and not to the person named in the writ.

(a) Mayn. 109.

Stonore, one of the justices, said, Then you may plead so if you will, but the writ is good; therefore *respondeas ouster*.

Then said *Willuby*, He cannot demand this annuity, because we say, that John our predecessor on such a day, &c. tendered him the vicarage of, &c. which was void, and in his gift, in the presence of such and such persons, which vicarage he refused; wherefore we do not understand that he can any longer demand this annuity. *Shard*. We say this vicarage was not worth 100 shillings; therefore we do not understand it to be a *convenable* benefice, so as to extinguish an annuity of 40*l*. *Willuby*. Then you admit that we tendered you the vicarage, and that you refused it, &c.? *Shard*. As to the tender of a benefice which was not *convenable*, I have no business to make any answer at all. Then *Mutford*, one of the justices, asked, What sort of benefice they considered as *convenable*, so as to extinguish the annuity? *Shard*. We mean one of ten marks at least. Then *Stonore* said, Do you admit that the vicarage was not worth 100 shillings? *Willuby*. We will aver that the vicarage was worth ten marks, *prest*, &c.; and he has admitted that one of that value should extinguish the annuity. *Shard*. And we will aver that it was not worth ten marks, *prest*, &c.

After this issue, *Willuby* was desirous of recurring back to his first plea, and said, As you declare that the vicarage was not worth 100 shillings, we will aver that it was worth 100 shillings, &c. But *Stonore* interposed, and said, He declares that the vicarage is worth ten marks; and after that there is nothing to be done, but that the issue should be taken on your declaration or his: now it seems that it should rather be taken on yours; for, by your plea, you make that a *convenable* benefice which is worth ten marks, and such a declaration you ought to maintain, &c. *Willuby*. The mention of the value came first from him, when he said it was not worth 100 shillings; so that it will be sufficient for me to traverse what he had

said. But *Stonore* pressing him whether he would maintain his plea, *Willuby* said he would, and accordingly pleaded that the vicarage was worth ten marks, *prest, &c. et alii*, that it was not worth ten marks, *prest, &c.* and so issue was joined (*a*).

The pleadings upon the record in the above case must then have stood thus: The defendant said, a vicarage had been tendered and refused, and so the annuity should cease, judgment of the action. To this the replication was, The vicarage tendered was not worth ten marks, and so not a convenable benefice to extinguish the annuity: rejoinder, it was worth ten marks: surrejoinder, it was not.

These instances, without troubling the reader with more, will serve to shew the manner of pleading *vivâ voce* at the bar: every thing there advanced was treated as a matter only *in fieri*, which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the court, according as it was a point of law or of fact.

The criminal law is exhibited by a writer ^{The criminal law.} of this reign in a state somewhat differing from that given by any preceding author. The crime of treason is divided in the following way; into *majesty, falsifying, and treason*. Majesty, or *læse majesty*, is that treason which is directed immediately against the king's person and dignity: as first, the killing of the king, or compassing so to do; secondly, disinheriting the king of his realm by bringing in an army, or compassing so to do; thirdly, ravishing the king's wife, the king's lawful eldest daughter before she is married, being in the king's custody, or the nurse or aunt of the king, being heir to the king (*b*).

(*a*) Mayn. 634.

(*b*) Mirror, ch. 1. sect. 4.

All these were considered as the crime of læse majesty. But this author has classed many other offences under this head, which have by construction been drawn into it. Of this kind he has collected many, which being what he calls *perjuria*, are, he thinks, properly to be ranked under this offence; because, says he, *every one who commits perjury, lieth against the king*. In pursuance of this notion, he enumerates many misprisions, negligences, abuses, and extortions of office, whether judicial or other, committed by judges or inferior ministers and officers; all which he considers as offences against the majesty of the king, which merited equal punishment with the before-mentioned defined cases of læse majesty (a).

Falsifying is either of the king's seal or his money (b). *Treason* he considers as an offence committed by a private person against another to whom he is bound by ties of blood, affinity, or alliance, which causes his death, disherison, or loss of homage; for the quality of treason, says our author, is, *the taking away of life or member, or decrease of earthly honour, or increase of villainous shame*, which he exemplifies in this manner (c): The strongest alliance is that of service. If one, says he, whom I have rewarded, who does fealty to me, and is seised in demesne of lands held of me; in short, if any one who has a possession, rent, vote, church, meat, drink, or other gift, from me, falsifies my seal, or ravishes my daughter or my wife, or the nurse or the aunt of my heir, or doth any thing which is the cause of my death, by a felonious compassing of the same, or to the great dishonour or damage of my body or my goods, or discovereth my counsel, or my confession, which he is charged to conceal; every one of these, says our author, is treason. It seems, after all, that what is here termed *majesty* and *falsifying*, constitute what we have since called *high-treason*; and this which our author calls

(a) Mirror, ch. 1. sect. 5.

(b) Ibid. sect. 6.

(c) Ibid. sect. 7.

simply so, is what has since been denominated *petit treason*. The catalogue of treasons, whether defined or constructive, given by this author, makes it unnecessary to look any where else for the reasons that induced the parliament in the next reign to fix the limits of this crime by statute.

Arson was described in very comprehensive terms. *Burners* were those who burnt a city, town, house, man, beasts, or other chattel, feloniously in time of peace, for hatred or revenge. If any one put a man into the fire, whereby he was burnt or blemished, although not killed, yet it was the offence of arson, and he was to suffer the penalty of it; as were also those who *threatened* to burn (a).

It appears by the definition given of *larceny*, that this crime was gradually assuming the appearance which it now bears. Larceny is said to be, *the treacherously taking away from another moveables corporeal, against the will of him to whom they belong, by evil getting possession or use of them*. Larceny, says our author, could not be committed of goods not moveable or not corporeal, as of land, rent, advowson, or the like; and it is said to be done treacherously, because if the taker conceived the goods to be his own, and thought he might lawfully take them, it was no offence (b). Many facts were considered as larcenies, which have since been looked upon only as cheats and civil injuries: thus bailiffs, receivers, and administrators, were said to *steal* goods, if they did not give in their accounts: false weights and measures, tricks in trade, and other deceits and impositions, are described in the Mirror as instances of larceny.

The offence of *burglary* was also very large, for it was not only the breaking of a house, but the felonious

(a) Mirror, ch. 1. sect. 5.

(b) Ibid. sect. 10.

assault of enemies in time of peace upon those who were in their houses with intent to repose there in peace, whether the assault was with design to kill, to rob, or to beat, was considered as burglary: and although such offenders did not accomplish their purpose, yet if there was a breaking, by the assault of doors, windows, or walls, to enter feloniously, they were guilty of this crime. Those also came within this offence, who feloniously forced their entry into another's house, and did violence against the peace, although the house were not broken; and that, whether by day or by night. This extensive description contains in it those notions which constitute the crime of burglary, as now understood, attended with many additional circumstances, that were gradually pared off in after-times.

Punishments were still various, and in some degree discretionary. Those convicted of *læse majesty* were to be punished according to the ordinance and pleasure of the king (a). Those convicted of *falsifying*, and of *treason*, were to be drawn and hanged. Those convicted of *burning* (b) and rape, were to be hanged (c); and so it was in murder, robbery, larceny above twelve-pence, and burglary, in cases not notorious; but if the offence was notorious, and the party taken in the fact, he was beheaded. Sodomites were to be buried alive (d); and heretics underwent a fourfold punishment, excommunication, degradation, disinheriting, and burning.

Inferior punishments not capital were these: mending the highways, causeways, and bridges; setting in the pillory and stocks; imprisonment; abjuration of the realm; exile; banishment, either from the kingdom or some particular town, by prohibiting the entering into or going out of such a place; by ransom; and by pecuniary penalties and fine (e).

a) Mirror, ch. 4. sect. 14.

(b) Ibid. sect. 15.

(c) Ibid. sect. 10.

(d) Ibid. ch. 4. sect. 14.

(e) Ibid. sect. 17.

Perjury which affected the life of a man was punished, as in the time of Edward I (*a*). with a mortal judgment, "to the example, says the book (*b*), of apparent murderers;" but perjury of a less heinous intent was punished with banishment, either for a time, or for ever. The woods, meadows, gardens, and houses of the perjured man were to be rased and destroyed, but his heirs were not to be disinherited.

The whole of this unhappy prince's reign ^{King and} was occupied in contests with his barons in government, defence of his favourites; during which the royal authority and the force of the laws were considerably diminished. The duke of Lancaster, with all his own power, and relation to the person of the king, could not obtain a regular and lawful trial, but in time of peace was condemned by a court-martial to suffer the punishment of treason.

So entirely was this king subdued, that he was constrained to sign a commission empowering the prelates and barons to elect twelve persons, who should have authority, for a limited time, to make ordinances, with all the force of laws, for the government of the kingdom. These twelve accordingly framed some regulations, which were presented to the parliament for their confirmation. Some of these were, to ascertain the qualifications of sheriffs; to abolish the practice of issuing privy-seals for the suspension of judicial proceedings; to give damages in case of malicious prosecutions; to order the method of making payments in the exchequer; to prevent the adulteration of the coin; and to regulate other matters tending to the preservation of order and good government (*c*).

During the weakness of such a reign, the clergy, who

(*a*) Vid. ant. 276. (*b*) Mirror, ch. 1, sect. 9. (*c*) Brady, App. No. 51.

had been reduced to some subordination by the late king, made no scruple of insisting on their ancient claims of exemption with firmness, and even with parade. *Adam de Orgeton*, bishop of Hereford, was arrested, and accused before the king and parliament of high-treason. He there pleaded, that he ought not to answer such high matters without the licence and authority of the archbishop of Canterbury, who, next to the pope, was his proper judge. Upon the prayer of the archbishop and his suffragans, he was delivered to the archbishop's custody. When he was afterwards brought to the bar of the king's bench, the bishops came in great form with their crosses, and took him forcibly from the bar, threatening to excommunicate all who should oppose them. The king after this caused an indictment to be found by a jury of Herefordshire against this prelate, upon which his temporalities were seized into the king's hands; yet the bishop, notwithstanding, escaped without any other punishment (a).

We are now to consider the sources of legal information belonging to this reign. These are the statutes, records, and year-books, together with one law-treatise. The statutes commencing with *Magna Charta*, and ending with Edward II. together with those called *Incerti Temporis* (it being doubtful to which of these three reigns to assign them), compose what have been called *Vetera Statuta*; and from the accident of their collection and publication in later times, are sometimes spoken of as the *prima* or *secunda pars veterum statutorum*. We have before made some observations upon the form and style of the *assise*, or statutes before the reign of Henry III (b). great part of which is equally applicable to those made since. The enacting authority is expressed by all these statutes, as subsisting in the king; who grants, directs, ordains, provides, sometimes by his coun-

(a) Parl. Hist. vol. I. 197.

(b) Vid. ant. vol. I. 215.

cil ; sometimes by the assent of the archbishops, bishops, abbots, priors, earls, and barons ; sometimes the assent of the commonalty is added. In some there is no mention of the concurrence of any part of the legislature. In some very few instances, among which is the statute of *Gavelet*, 10 Ed. II. it is said to be provided by the king and *his justices*, without any mention either of lords or commons. It is evident from *The Mirror*, that laws were often made in this latter way ; for the author of that book complains, that ordinances are only made *by the king and his clerks*, and by aliens and others who dare not contradict the king, but study to please him (*a*). We must therefore conclude, that the same ideas of legislation prevailed now, which were stated to have governed in the time preceding the reign of Henry III (*b*). and that the calling the commons to parliament, as it gave them certainly no greater place there than the lords had before, could not impart to them a greater right to concur in legislative acts, than the lords themselves claimed.

Many of these old statutes do not at all express by what authority they were enacted ; so that it seems, as if the business of making laws was principally left in the hands of the king, unless in instances where the lords or commons felt an interest in promoting a law, or the king an advantage in procuring their concurrence ; and in such cases probably it was that their assent was specially expressed.

There are some circumstances common to all these statutes. All those passed in one session of parliament are strung together, making so many *capitula*, or chapters of one statute ; to which is usually prefixed, a memorandum of the time and place of the meeting of parliament, with the occasion for calling it. The chapters are short, and the manner of expression very often too general and undefined ; offences are loosely and ambiguously described ; rarely any certain penalty is inflicted on offenders ; they

(*a*) *Mirror*, ch. 5.

(*b*) *Vid. ant. vol. I. 216.*

are to be punished at the king's pleasure, are to make grievous ransom to the king, are to be heavily amerced, and the like; sometimes the acts are merely admonitory or prohibitory, without affixing any penalties, or prescribing any course of process for prosecuting, hearing and determining the offences. In the time of Henry III. the statutes are mostly in Latin; in the reign of Edward I. they began to be in French also; and the statutes of this reign and of Edward II. are sometimes in Latin, and sometimes in French. Sometimes there occurs a chapter in one language in the midst of a statute in the other; and there is a chapter of Westm. 2. partly in French and partly in Latin (*a*). It is difficult to account for such remarkable variations as these. Some have thought that they discovered one rule to prevail through these statutes respecting this change of language; namely, that all such acts as concerned the interests of the church were in Latin; though this is confessed by the person who started it to be subject to so many exceptions as almost to destroy the rule (*b*). Perhaps the legislature was governed by no general principle in chusing the language of their statutes: both the Latin and French were the languages of the law, and probably were adopted according to the whim of the clerk or other person who drew up the statute. In the act above alluded to, as it was the revival of the old law, perhaps the scrap of French in which it was worded was taken from some law-book in that language, treating upon the subject, in its original state; or perhaps it was thought more adviseable that this article, as it was a repeal of a chapter of Westm. 1 (*c*). should be in the same language as that statute, though the rest of Westm. 2. was in Latin.

The clerical legislature, during this reign, added little to our national canon law. There are no other constitutions than those of archbishop Reynolds (*d*).

(*a*) Namely, ch. 34. Vid. ant. 211.

(*b*) Barr. Obs. pa. 65.

(*c*) Namely, ch. 13. Vid. ant. 125.

(*d*) Vid. Johnson's Canon, and Spelm. Counc.

The materials of legal information grow to a greater size in this reign than in any of the preceding; for besides the statutes and judicial records, which begin now to be more numerous and perfect, at this period begin the *Year Books*, or Books of *Years and Terms*, as they were sometimes called. These contain reports of cases adjudged from the beginning of this reign to the end of Edward III. and from the beginning of Henry IV. down to the end of Henry VIII.

The *Year Books* are said to be so called, because they were published *annually* from the notes of certain persons, who were paid a stipend by the crown for this employment (a). The establishment of Reporters is said to have been first made by this king, or more probably at the latter end of the former reign; for this institution came precisely within the plan of that prince's endeavours to improve our laws, and was the grand means so much wanted, that of *putting them into writing* (b). However, as we have no fruits of such an appointment till the beginning of this reign, we may suppose it did not take place till then (c).

As a record is a concise entry of all the real and effective steps made in a judicial proceeding, a report is a short note of the progress towards making those steps; the debate in court concerning some of them; the decision upon their propriety and design; and the grounds and principles upon which the decision was supported. The reports of this reign, as they were the first essays in this way, fall short of the clearness and fulness with which reports have been made in later times. Being minuted down by the reporter in

(a) It may be remarked, that *Jaar-Boecken* in the Low German signifies *Annals*. *De Jaar-Boecken van C. Cornelius Tacitus*, is the title given to a Dutch translation of that work.

(b) The author of the *Mirror*, among the abuses of the law, complains that the law was not sufficiently put into writing. *Mirror*, ch. 5.

(c) There are said to be reports of cases adjudged during the reign of Edward I. in manuscript, in certain public libraries; but these do not appear to be in any series that would justify one in supposing there was a regular appointment like that above mentioned.

court at the instant, as the thing really passed, they have in them all the dryness necessarily attending such a formal memorandum, which is much heightened by the starch manner in which these matters were usually then transacted in court. The way is this: The action is first stated; then comes the counsel for the plaintiff, who rehearses the declaration; he is followed by the counsel for the defendant; and so on; till the pleadings on both sides are brought to an issue: and here the report often ceases, concluding with the whole that was done that day, without the least intimation what afterwards became of the cause. The counsel are continually interrupted by occasional observations from the bench on the form and legality of the pleadings; these are argued, altered, or amended; then the counsel proceed till something else arises to draw the notice of the judges. It cannot be denied that this is sometimes managed with sufficient acuteness, and exhibits often a curious piece of judicial disputation. The whole is concise; without any length of deduction, concatenation of argument, or display of learning. The want of these, and the clerical method of the whole, make this first attempt at reporting not a very inviting performance to a modern reader (*a*).

The *Mirror*. The *Mirror of Justices* is a book, whose consideration may properly belong to this reign. This singular work has raised much doubt and difference of opinion concerning its antiquity. Some have pronounced it older than the Conquest (*b*); others have ascribed it to the time of Edward II. Both these opinions may be partly right. There may perhaps have been a work by this name as early as the date supposed; but whoever judges from the internal evidence of this book will be satisfied, that great part of it is of a period much later, and certainly written after *Fleta* and *Britton*; for it states many points of law,

(*a*) An idea of those reports may be conceived from the account before given of the manner of pleading in court. Vid. ant. 344, et seqq.

(*b*) Among these are lord Coke and Nathaniel Bacon.

as it were, in a stage of progression somewhat receding from those writers, and approaching nearer to those of later times. It is probable that *Andrew Horne*, whose name it bears, might take up an ancient book of that name, and work it into the volume we now see, in the reign of this king, or at the end of the former; and if so, we should expect that whatever it propounds was actually law in the reign of Edward II.

This book treats of all branches of the law, whether civil or criminal. Besides this, it gives a cursory retrospect of some changes ordained by former kings; enumerates a list of abuses, as the author terms them, of the common law, proposing, at the same time, what he considers to be desirable corrections. He does the same with *Magna Charta*, the statutes of *Merton* and *Marlbridge*, and some principal acts in the reign of Edward I.

This book should be read with great caution, and some previous knowledge of the law as it stood about the same period, for the author certainly writes with very little precision. This, with his assertions about Alfred, and the extravagant punishments inflicted by that king on his judges, have brought his treatise under some suspicions. When read with these hints, *The Mirror of Justices* is certainly a curious, interesting, and, in some degree, an authentic tract upon our old law; though, considering the anachronisms in legal knowledge (if they may be so called) with which it abounds, that the antiquated law is promiscuously blended with that of the time in which it was revised, and that the date of such revision is very uncertain, it is to be wondered that some great writers (a) have relied so much upon this author, as to pronounce on the antiquity of many articles of our law merely on his authority.

There is nothing but a vague tradition to give us any trace of the places where the practitioners and students of the law had their residence before the reign

(a) Lord Coke and Nathaniel Bacon.

of this king. But in the reign of Edward II. we are informed that such places were called *Hostels*, or *Inns of Court*, because the inhabitants of them belonged to the king's courts. There is said to have been one of these at *Dowgate*, called *Johnson's Inn*; another in *Fewter's* (that is, *Fetter*) *Lane*; and another in *Pater-Noster-Row*. An ancient custom is vouched to support a belief that some Inn was in the neighbourhood of St. Paul's Church. It is said, that the serjeants and apprentices, each at *his pillar*, used to *hear his client's case, and take notes thereof upon his knee*; a custom which was remembered by a solemnity observed in the time of Charles I. upon the making of serjeants; for it was then a custom for them to go there in their formalities, and *chuse their pillar*.

It is reported, that William *earl of Lincoln*, about the beginning of this reign, being well affected to the study of the laws, first brought the professors of them to settle in a house of his, since called *Lincoln's Inn*. The earl was only lessee under the bishops of Chichester; and many succeeding bishops, in after-times, lett leases of this house to certain persons, for the use and residence of the practicers and students of the law (a); till in the 28th year of the reign of Henry VIII. the bishop of Chichester granted the inheritance to Francis Sulyard and his brother Eustace, both students; the survivor of whom, in the 20th year of queen Elizabeth, sold the fee to the benchers for 520*l*. It seems clear, that *Thavies Inn* was inhabited at this time by lawyers. Such are the first Inns of which we have any account that can be depended on (b).

The number of suits so increased in the common bench, that whereas there had usually been only *three* justices there, Edward II. at the beginning of his reign was constrained to increase them to *six*, who, we are told, used to sit in two places; a circumstance not easy to account for (c);

(a) Dugd. Or. Jur. 231.

(b) Ibid. 143.

(c) Ibid. 39.

within three years after, they were increased to *seven*: next year they were reduced to *six*, at which number they continued.

In 17 Edward II. Hervie de Staunton, chancellor of the exchequer, was constituted chief justice of the king's bench; and his former post was to be executed by deputy while he heard causes *in Banco Regis* (a).

In the sixth year of this king (b), oyer of a writ being demanded, it was there said by the justices, that as it was purchased a long time ago, it was in the Tower of London, and therefore there must be a writ out of chancery to cause it to be brought at a certain day. While this fact shews where the depository of judicial records then was, it also accounts, in some measure, for the great destruction and mutilation of them. These occasional removals must bring them into continual hazard of being lost, or destroyed.

This reign is, however, marked with the first instance of royal interposition, not only for the better custody and preservation of records, but for the regular sorting and arrangement of them in such manner as would be most conducive to make them answer the end for which they were designed. In the 14th year of his reign, this king, by writ of privy-seal directed to the treasurer, barons, and chamberlains of the exchequer, commanded them forthwith to employ proper persons to superintend, methodize, and digest all the *rolls, books, and other writings* of the times of his progenitors, kings of England, then remaining in the *treasuries of his exchequer*, and in the *Tower of London*; all which, as he there declares, were not at that time disposed in such manner as they ought to have been, for his and the public service. Again, in his 16th year, the king commanded the treasurer and chamberlains to cause all *papal bulls, charters, and other muniments* touch-

(a) Dugd. Or. Jur. 38.

(b) Mayn. 190.

ing his state and liberties within England, Ireland, Wales, Scotland, and Ponthieu, then remaining in the *four treasuries of the exchequer, the wardrobe, and sundry other places*, to be regularly sorted, and calendars to be made. At the distance of a few months after, he appointed *Robert de Hoton*, and *Thomas de Sibthorp*, to examine and methodize all such *charters, writings, and other national muniments*, as at that time were deposited in the castles of *Pontefract, Tuttebury, and Tunbridge*; also such as had been newly brought into the Tower of London; and all those which were then kept in the house of the *Black or Friars Preachers*, within the city of London. The keepers and the constables of those castles, and the prior of the order of Friars Preachers, were strictly enjoined to allow the two persons so appointed to have free access to such records, and to give them all necessary aid and assistance.

There appear in subsequent reigns, instances of a similar interposition for the protection of public records. There are now on record several writs to this effect—*De supervidendo rotulos, &c.*—*De rotulis et scriptis in recto ordine ponendis, &c.*—*De scrutinio Chartarum faciundo, &c.* and the like.

Ever since the separation of the chancery from the *Aula Regis*, the rolls and records of that court had been kept separate, and they had lately multiplied to a great number. To relieve the chancellor from this concern of keeping the records, a particular officer was appointed for that purpose in this reign. William de Armyng was, with the consent of the chancellor *John de Sandale*, appointed *master, or keeper of the rolls*, and had the custody of them committed to him in the 20th year of this reign (a).

(a) See Ayl. Chart. Introd. 25.

CHAP. XIII.

EDWARD III.

Of Judicature in Ireland—Lancaster made a County Palatine—The Charters—Of Purveyance—Tenures—Of the Clergy—Scire Facias for Tythes—Of Provisors—Of Præmunire—Probate of Wills and Intestacy—The Statutes of Labourers—Trade and Commerce—The Statute of the Staple—Forestalling—Children born out of the Realm—Of Sheriffs.

THE reign of this king fills a great and distinguished space in the history of our law, whether we regard the statutes that were passed, or the decisions made by the courts. The order of proceedings, both civil and criminal, were amended in many instances by statute; and in the course of half a century, there was hardly a title or question that did not, at one time or other, undergo some discussion in court. The judicature of parliament and of the council, as well as that of inferior courts, was adjusted; the claims of the clergy were qualified and settled; the crime of treason was defined; justices of the peace were established; the inferior ministers of justice were regulated. The learning of the law received considerable accessions. Entails and remainders, discontinuances and remitter, actions upon the case; all these were new subjects of argument. While these novelties were introduced, the old law was modified, real writs were better understood, and personal actions more considered. Such are the principal heads of inquiry in this king's reign. We shall begin with the statutes.

The great length of this reign, and the frequent sitting of parliament, contributed to give birth to more acts of legislation than are to be found in any of the preceding reigns. The statutes being very numerous, and at the same time multifarious and short, it seems adviseable, in discoursing upon them, to deviate from the method that has hitherto been observed; and, instead of treating this part of our subject chronologically, it will be, perhaps, more conducive to a thorough understanding of what was done by the legislature towards meliorating our jurisprudence, to digest the statutes, according to the object of them, into heads, and then speak upon them in that order which the history of each head may seem to require; so that, notwithstanding the course of time may be disregarded as to the whole, the several parts will be considered as nearly as can be in an historical way. The same method will be followed, for the same reason, in all the subsequent reigns.

A very large portion of the statutes of this reign may be ranked under the title of regulations for the better administration of justice, both civil and criminal. The remainder, which cannot properly be classed under that head, are of so important a nature, as to deserve a separate consideration. Of this kind are the statutes that relate to the political condition of the king's dominions, or the executive authority of the crown; those relating to tenures, or to the clergy; the statutes of labourers, and the laws made for the protection of trade and commerce. We shall first take a view of the regulations made by these particular statutes, and then proceed to those relating to the administration of justice.

Of judicature in Ireland. The principal act of a political kind, is the *Ordinatio pro statu Hiberniæ*, 31 Ed. III. st. 4. This, like a statute of the same title enacted in the reign of Edward I (a). was made for the correction of cer-

(a) Vid. ant. 99.

tain irregularities in the administration of justice in Ireland. It appears by this act, that Ireland was then furnished with courts of record corresponding, and bearing the same names, with ours. The two superior tribunals of this kingdom, those of the *parliament* and of the *council*, seem to be imparted to that kingdom, or confirmed by the present statute. Matters of a more important and arduous kind, says the act, shall be agitated and determined, either in council *per peritos consiliarios nostros, ac prælatos & magnates, et quosdam de discretioribus et probioribus hominibus* of the neighbourhood where the council happened to be held; or in parliament, *per ipsos consiliarios nostros, ac prælatos et procures, aliosque de terrâ prædictâ*, according to the custom and law of the country (a). It seems, at least from this mention of the council and parliament in regard to judicial matters, that the constituent members of each were not ascertained with any great exactness.

The remaining provisions of this act were of a very general nature, being chiefly to enforce such laws as had been made in the time of Edward I. and had been, or were now intended to be, ingrafted on the Irish constitution; such as the statute of Winchester, those against maintenance, champerty, and other extortions and mal-practices of ministers belonging to courts (b); and also some made in this reign, as those against purveyors, particularly stat. 4 Ed. III. c. 4 (c). In the same spirit which dictated some laws to restrain the too easy granting of pardons in England, it was directed, that the justiciary of Ireland should not grant pardons of offences but in, and with the assent of, the council and parliament: pardons were not to be general, but specifying the crime pardoned (d). It was ordained, that the mayors and constables of staples should not hold

(a) Ch. 2.

(b) Ch. 3. 5. 10. 18. Vid. ant. 213. 240.

(c) Ch. 4.

(d) Ch. 6.

any pleas but according to the statute of the staple (meaning the English statute) (a) ; nor should any pleas be held in the exchequer against the statute, that is, the stat. *Artic. super Chartas* (b).

It seems the justiciary of Ireland used to go circuits twice a-year, together with others who were associated with him on the occasion: these were held in every county. It was now directed, that he should once a-year associate with himself a prelate and earl, the chancellor and treasurer, and some of the discreeter justices of the two benches, and barons of the exchequer; and make inquiry into the conduct of other judges, by the oaths of good and lawful men, as well clerks as knights, and certify to the king the result of such inquiry (c).

These were the principal matters contained in this statute. Although this act refers to several English statutes with the same familiarity as if they were the law of Ireland, without enacting them, or taking notice how or when they were adopted there, yet it intimates that that country had customs peculiar to itself; for it directs that certain things should be ordered *secundum legem et consuetudinem terræ nostræ Hiberniæ*. Perhaps the usual way of introducing English statutes into Ireland, was to transmit them thither under the great seal, as they were sent into English counties to the sheriffs. Thus when the ordinance, of which we are now speaking, directs that felonies shall not be pardoned generally, but that the fact shall be specified, it goes on, *juxta tenorem cujusdam statuti per nos et consilium nostrum Angliæ editi, et missi ad Hiberniam observandi* (d), alluding to a statute of this king, which will hereafter be mentioned (e). We have before seen, that the

(a) Ch. 9. (b) Ch. 11. Vid. ant. 237. (c) Ch. 17. (d) Ch. 6.

(e) It may be remarked, that at this period, while laws were thus imposed on the Irish nation by the legislature of this country, and at the pleasure of the crown, that country had a parliament of its own.

statute of Lincoln, 12 Ed. II. st. 1. was transmitted to Ireland to be enrolled in the chancery there, and to be sent to the different courts, and also into the several counties, to be observed the same as in England (*a*). The whole business of legislation was, in these days, extremely arbitrary and irregular, as well in the manner of executing and enforcing statutes, as in that of making of them.

To return to English affairs. As Edward had assumed the title of France, some persons apprehended, that should the two crowns hereafter unite upon one head, this, being the smaller, might be treated as the subject kingdom. To quiet these jealousies, the king caused it to be declared in parliament by stat. 14 Ed. III. st. 5. that this kingdom should never be in subjection to him or his heirs, as kings of France: but this is one of those laws to which it has pleased Providence there should be no occasion to resort.

Some years after, towards the close of his reign, the king dealt less scrupulously with the crown and its prerogatives, by investing one of his subjects with a part of its royalties. We have seen that William the Conqueror, soon after he was settled, had given to the earl of Chester the royalty and prerogatives of a county palatine in Chester: the same princely franchise had for many years been enjoyed by the bishops of Durham, in their bishopric (*b*). In imitation of these, the king, in the 25th year of his reign, having promoted his favourite son John, who had married a daughter of the late Henry duke of Lancaster, to the title of duke of Lancaster, did in reward of his great services in the French war confer on him the county of Lancaster, with the power of having a chancery, and writs issuing therefrom; the appointment of justices for all pleas, civil or criminal, with officers for the due execution of justice; *et quæcunq; alia, libertates et jura regalia ad comitatum palatinum pertinentia, adeo liberè et integrè, sicut Comes*

(*a*) Vid. ant. 302, 303.

(*b*) Vid. ant. vol. I. 48.

Cestriæ dignoscitur obtinere. So distinguished an honour as this was conferred in open parliament (a).

The lords marchers on the confines of the principality of Wales exercised franchises somewhat similar to those of counts palatine (b). To keep these barons under the sovereignty of the king, it was enacted, by stat. 28 Ed. III. c. 2. that such lords and lordships should be attending and annexed to the crown of England, as they had been in all times past, and not to the principality of Wales, into whatsoever hands the principality might come. The dependence of these lords on the crown of England was extremely necessary towards the peace and quiet of the neighbouring counties.

In no time was there greater shew of solicitude to secure the subject in the enjoyment of his rights and privileges, than all through this reign. It was in this spirit that the stat. 4 Ed. III. c. 14. was made, ordaining, that a parliament should be held every year once, and more often if need be; which was renewed by stat. 36 Ed. III. st. 1. c. 10. It was intended by the frequent and regular meeting of that assembly, that resort might always be had thither for

The Charters. (a) Tyrr. vol. III. 567. We are told, that “in the 36 Ed. III. the king in full parliament did gird his son John with a sword, and set on his head a cap of fur, and upon the same a circle of gold and pearls, and named him duke of Lancaster, and thereof gave to him and to his heirs male of his body, and delivered him a charter. This was the third duke England ever saw. Again, in full parliament, anno 50 Ed. III. the king erected the county of Lancaster into a county palatine, and honoured the duke of Lancaster therewith for term of his life.” So says Lord Coke, 4 Inst. 204. The grant was thus: *Concessimus pro nobis et hæredibus nostris præfato filio nostro quòd ipse ad totam vitam suam habeat infra comitatum Lancastriæ cancellariam suam, ac brevia sua sub sigillo suo pro officio cancellarii, deputando et constituendo justitios suos tam ad placita coronæ quàm ad quæcunq; alia placita communem legem tangentia, tenenda, ac cognitiones eorundem, et quascunq; executiones per brevia sua, et ministros suos faciendas; et quæcunq; alia, libertates et jura regalia ad comitatum palatinum pertinentia, adeo liberè et integrè sicut Comes Cestriæ dignoscitur obtinere.*

(b) Vid. ant. 94.

the correction of disorders, and the amendment of the law. The Great Charter, and the Charter of the Forest, being considered as the corner-stones of the English law and constitution, were confirmed over and over again. It seemed to be a matter of course all through this reign to prefix a confirmation of the Charters to every statute of any length or consequence. To these two Charters were sometimes added, a confirmation of all franchises and privileges enjoyed by cities, boroughs, or individuals; and sometimes, though less frequently than in former times, a confirmation of the liberties of the church (*a*). Not content with these general confirmations, particular parts of *Magna Charta*, which were esteemed more calculated for protecting the rights of the people, were specially re-enacted. It was declared, by stat. 5 Ed. III. c. 9. (in conformity (*b*) with the express words almost of *Magna Charta*, ch. 29.) that no man should from thenceforth be attached on any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels, seized into the king's hands against the form of the Great Charter and the law of the land; and again, by stat. 28 Ed. III. c. 3. that no man, of what estate or condition soever, should be put out of his land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in to answer by due process of law.

Among other grievances provided against by the Great Charter, and also by statutes in this reign, was that of *purveyance*. Very early in this king's time some laws were made to regulate purveyors; and these were followed by several others made in different parts of the reign. It was enacted, that there should be no *purveyance* but for the house of the king and queen,

(*a*) Stat. 1 Ed. III. st. 2. c. 1. 9. Stat. 2 Ed. III. c. 1. Stat. 5 Ed. III. c. 1. Stat. 14 Ed. III. st. 1. c. 1. Stat. 31 Ed. III. st. 1. c. 1. Stat. 37 Ed. III. c. 1. Stat. 38 Ed. III. st. 1. c. 1. Stat. 42 Ed. III. c. 1. Stat. 50 Ed. III. c. 1, 2.

(*b*) Vid. ant. vol. I. 249.

and their children; which too was to be at a fair appraisement (*a*): and it was made felony to take any thing, by way of purveyance, without a lawful warrant (*b*). Many other checks were imposed on purveyance. The commission of purveyors was to be under the great or privy seal, and none other (*c*): they were not to take timber (*d*); and the king's butler was not to take more wine than should be appointed (*e*). Purveyances under twenty shillings were to be paid immediately, and those above that sum within a quarter of a year (*f*): afterwards it was directed, that poultry and other small articles should be paid for with ready-money; and all other things within a month or six weeks (*g*). At length it was enacted, that the *heinous name* of *purveyor* should be changed, and he should be named *buyer*; and accordingly that statute all through speaks of it as of *buying and selling*, and calls them *buyers and sellers*. This statute confines such prerogative-buying to the house of the king and queen only; nor was it to be made but where there was plenty. The commissioners were to be people of sufficient estate; their commissions to be renewed half-yearly. All takings and buyings were to be for ready-money only; and to take any otherwise than ordained by this act, was made felony (*h*), as we have seen it had been upon the former method of purveyance. There were likewise penalties inflicted on buyers, if they favoured some, and charged others (*i*). Commissions were to be awarded to inquire what things buyers had taken, and what they had delivered; and punishments inflicted for defaults either in taking or delivering (*k*). Thus was the great oppression of purveyance gradually fined down to a more gentle form, till it amounted to little more than a

(*a*) Stat. 4 Ed. III. c. 3. Stat. 34 Ed. III. c. 2. (*b*) Ch. 4. Stat. 5 Ed. III. c. 2. Stat. 14 Ed. III. st. 1. c. 19. (*c*) Stat. 25 Ed. III. st. 5. c. 1. (*d*) Ch. 6. (*e*) Ch. 21. (*f*) Stat. 28 Ed. III. c. 12. (*g*) Stat. 34 Ed. III. c. 3. (*h*) Stat. 36 Ed. III. st. 1. c. 2. (*i*) Ch. 3. (*k*) Ch. 4, 5, 6.

pre-emption, or preference in favour of the king and queen's household.

Having considered such statutes as related to the political condition of the king's dominions, and the executive authority of the crown, we come now to the statutes that made any alteration in the law of tenure. We ^{Tenures.} have seen how the law stood as to the alienation of the king's tenants *in capite*, by the statute *De prerogativa regis* (a). Notwithstanding the sort of liberty there admitted to be in tenants *in capite*, these landholders could never safely alien without the king's licence; and if they did, the land used to be seized into the king's hand as forfeit, according to the rigour of the old law between lord and vassal. This was, however, now thought a severe penalty; and it was ordained by stat. 1 Ed. III. st. 2. c. 12. that the king should not in such case hold the land as forfeit, but that in all cases of such alienation, he should have a reasonable fine in the chancery to be levied by due process. Thus forfeiture for alienation was wholly taken away, and in lieu thereof a fine was paid by the king's tenants as a matter of course, either before or after alienation. Some years after, in order to quiet property, a statute was made (b) to confirm all alienations of tenants *in capite*, made in the reign of Henry III. or before; saving to the king his prerogative, as to all that had been made in the time of Edward I. Edward II. and in the present reign. Because some lands holden of the king, as of an honour, had been seized for alienation, under pretence of their being tenancies *in capite*, contrary to *Magna Charta*, which had explained this matter (c), it was declared by the same statute (d), that no man should be aggrieved by reason of such purchases.

(a) Viz. ch. 6. Vid. ant. 307.

(b) Stat. 34 Ed. III. c. 15.

(c) Viz. ch. 31. Vid. ant. vol. I. 238.

(d) Stat. 1 Ed. III. st. 2. c. 12.

To qualify some of the king's feudal claims, it was declared, by stat. 25 Ed. III. st. 5. c. 11. that a reasonable aid *pur faire fil chevalier*, and *pur file marier*, should be levied according to the statute (a), and in no other way; that is, of every knight's fee held immediately of the king, twenty shillings, and of every twenty pounds of land holden immediately of the king in socage, twenty shillings and no more. The services of tenure were made a pretence for exacting more attendance than tenants were by law bound to perform. Such excesses made it necessary to declare, by stat. 25 Ed. III. st. 5. c. 8. that no man should be constrained to find men of arms, hoblers, nor archers, except they held by those services, and then only by common assent and grant of parliament; so that even the common dues of tenure were no longer to be demanded, than when they were called forth by an act of parliament. These regulations strongly shew, that the feudal constitution had now ceased to answer the purposes of its first institution, and was hastening to the decay and neglect into which it soon after fell. In the time of Edward II. the ministers of that prince had compelled many to enter into obligations to be attendant on the king with arms and accoutrements; all which were declared void in the first year of this reign (b), and ordered to be cancelled. To such expedients had they recourse, as substitutes for the ancient military policy, which was now found inadequate and useless.

Tenures were principally considered as a source of revenue to the crown: in that light they were as strictly kept up as ever, and became very often the occasion of great oppression. The ascertaining of the king's right, in these instances, depended on the escheators; and many statutes were made in this reign for the better ordering of that office, as well to secure the king in a due receipt of all

(a) Viz. Westm. 1. ch. 36. Vid. ant. 111.
st. 2. c. 15.

(b) Stat. 1 Ed. III.

his lawful casualties, as to protect the people against the mal-practice of officers intrusted with so much power. It seems, the number of escheators had been reduced to two; one to act on this side *Trent*, the other beyond it. But a statute was made to increase the number to what they had been when the king first came to the throne; which number, however, is not mentioned by the act. It was further ordained, that those escheators should be chosen by the chancellor, treasurer, and chief baron of the exchequer, taking to them the chief justices of the two benches, if they were present, the same as in chusing sheriffs, which will be mentioned hereafter. No escheator was to continue in his office above a year (*a*). Escheators were not to do waste in lands belonging to the king's heirs, but were to return the writ of *diem clausit extremum*, with a true extent, into the chancery forthwith; and if the next friends of the heir pleased, they might have the lands in farm till the heir's age, yielding the value to the king, by agreement with the chancellor and treasurer. The heirs, when they came of age, were to have an action of waste against such guardians and farmers (*b*). Escheators were to be answerable to the king for the value of the farms of mills and other profits belonging to the king's heirs, in proportion to the time they were in the king's hands (*c*): they were to take inquests by good people and lawful, of sufficient inheritance and good fame, and of the same county where the enquiry should be; and the inquests so taken were to be indented between the escheators and the jurors; if not, they were to be void: the inquests were also to be taken in good towns, openly, and not privately (*d*). Wherever lands were seized into the king's hands by office of the escheator, on account of alienation without licence, or the tenant *in capite* dying and leaving his heir within age, it was to be returned into the chancery; and if the

(*a*) Stat. 14 Ed. III. st. 1. c. 8. (*b*) Ch. 13. (*c*) Stat. 28 Ed. III. c. 4.

(*d*) Stat. 34 Ed. III. c. 13.

tenant would *traverse the office* so taken by the king's command, and say, that the lands were not seizable, he was to be received so to do, and process was to be sent into the king's bench to try it according to law (a).

At length it was ordained more fully by stat. 36 Ed. III. st. 1. c. 13. that land seized into the king's hands because of ward should be kept without waste; that the escheator should have no fee of wood, fish, venison, or other thing; but should answer yearly to the king for the issues and profits; and if he did otherwise, and was attainted thereof, he was to be ransomed at the king's will, and yield to the heir treble damages: the same was to be in all cases of lands seized into the king's hands by office taken before escheators. The escheator was to send the inquest, within a month, into the chancery, and a writ was to be delivered to him to certify the cause of seisin; and then any party might be heard to traverse the office, and shew his right, as directed by the above act; only there is added by the present statute the pain of two years imprisonment in case the escheator acted otherwise. By stat. 42 Ed. III. c. 5. no person was to be escheator unless he had 20l. at least of lands in fee, and discharged his office in person. There was great complaint, that escheators, sheriffs, and other officers of the king, seized the lands, goods and chattels of many, surmising that they were outlawed; which was often grounded upon a person having the same name with the person meant in the writ, who was not sufficiently distinguished by an addition, or particular description. To prevent the oppression consequent upon such mistakes, it was ordained, by stat. 37 Ed. III. c. 2. that persons so injured should have a writ of *idemtitate nominis*, a writ that was in use before this act, but of which we have not yet had occasion to say any thing. Besides that, the following course of redress was now directed. The party whose land

(a) Stat. 34 Ed. III. c. 14.

or goods were seized was to find surety before the officer who had the warrant of seizure, to answer for the value to the king; and this was to be done without any fee, on pain of double damages to the party grieved, and being heavily punished at the king's suit. Thus, in one instance, was a very summary method devised for those who were injured by these officers.

Several statutes were made in this reign to settle such claims of the clergy as still remained exposed to the jealousy of the temporal power, and were not secured by any parliamentary provision. The great subject of discussion between the spiritual and temporal authority had hitherto been upon the jurisdiction of causes, and the personal exemption of clerks from the secular courts. This dispute had been so adjusted by the statutes of *Circumspectè agatis*, and of *Articuli cleri*, in the two last reigns (a), that no further clamour was kept up on that head. Some points, however, respecting the property of the church, called for regulation; others that had been lately occasioned through the ambition and avarice of the pope, created new apprehensions, and became fresh subjects of discontent in this and the next reign. It was endeavoured to restrain these new usurpations by the statutes of *provisors*. These, and the other statutes relating to the clergy, exhibit the clerical state in a new point of view, and are well deserving attention. We shall, therefore, take a view of them in the order in which they were made.

The first statute on the subject of ecclesiastics and ecclesiastical property, is stat. 1 Ed. III. st. 1. c. 10. by which the king binds himself not to demand of bishops and religious houses any pensions, prebends, churches, and corodies for persons, but in cases where he in conscience might do it. The next are stat. 4 Ed. III. c. 6. and stat. 5 Ed. III. c. 3. both confirming the statute of Carlisle,

(a) Vid. ant. 215. 291.

35 Ed. I. st. 1. (a): then follows stat. 14 Ed. III. st. 4. which was occasioned, as the act says, by many oppressions and grievances done in divers manners by the king's servants to people of holy church. To prevent these in future, it was enacted, in the first place, that the king's purveyors should take nothing within the fees of holy church against the will of the owners (b). The other provisions of this act relate to the temporalties of bishops. As the law now stood, the exception of plenarty, in a writ for recovery of a presentation, was never allowed against the king, because he was not within the stat. West. 2. c. 5 (c). and was, besides, protected by the old maxim, *nulum tempus occurrit regi*. It often followed from this, that persons were turned out of their benefices after long possession, by reason of the temporalties of bishops and advowsons of infants coming into the king's hands. To remedy this in future, it was ordained, that the king, in such cases, should not make collation or presentment after three years from the avoidance; nor should any one, after such time, be bound to answer to the king in a *quare impedit* (d): and further, the king declared that he would not seize into his hands the temporalties of bishops, abbots, priors, or other people of holy church, without just cause, according to and by judgment of law (e).

Because the king's escheators and other keepers of temporalties had been used to commit great waste, it was ordained, that such persons should do no waste or destruction; they should sell no underwood, nor hunt or fish thereon, nor rack the tenants: and in order to put the custody of temporalties into safer hands than those of the king's officers, they were to be offered to the dean and chapter, to whom they were to be demised by the chancellor and treasurer at a reasonable rate, according to the remembrances

(a) Vid. ant. 157.

(b) Ch. 1.

(c) Vid. ant. 194.

(d) Ch. 2.

(e) Ch. 3.

in the exchequer; so that escheators should have no right to intermeddle therein; saving, however, to the king all knight's fees, advowsons of churches, escheats, wards, marriages, reliefs, and services of the said fees (*a*). The letting such lands to the dean and chapter was founded upon the same policy as that before mentioned, of letting the lands (*b*) to the next friends of the heir; these persons having a sort of interest in the lands, at least such a relation to them as was likely to restrain them from committing destruction or waste thereon.

Another statute was made for the better ordering of clerical property, intitled, *A statute for the clergy*, stat. 18 Ed. III. st. 3. One provision of this was to secure the execution of the statutes of mortmain passed in the time of Edward I (*c*). If prelates, says the act, clerks beneficed, or religious people, who have purchased lands in mortmain, were impeached thereof before justices, and they shewed the king's charter of licence and process thereupon made by an inquest of *ad quod damnum* (*d*), or the king's grace, or by fine, they should be left in peace, without any further disturbance: and if it should not appear that they entered by licence, they should be received to make a convenient fine for the same, and so the matter should cease (*e*).

The following provisions relate to matters of jurisdiction. Besides the grant, that an archbishop should not be impeached criminally before the king's justices, and what related to the trial of bastardy (*f*) (both which will be mentioned in another place) it was declared, that no prohibition should be awarded out of the chancery but where the king had cognizance (*g*). And because commissions had of late been given to justices to inquire into the conduct of ecclesiastical judges, whether they made just or excessive process in causes testamentary, and others that notoriously

(*a*) Ch. 4, 5.

(*b*) Vid. ant. 373.

(*c*) Vid. ant. 154, &c.

(*d*) Vid. ant. 230.

(*e*) Ch. 3.

(*f*) Ch. 1, 2.

(*g*) Ch. 5.

belonged to the church, upon which commissions many spiritual judges had been indicted; it was now enacted, that such commissions should be repealed, and no others should be granted, except only of such articles as used to be in the eyre.

Scire facias for It was a common process to institute an inquiry about tythes by a *scire facias* against some ecclesiastical person, warning him to answer in the chancery concerning his tythes, and there shew cause wherefore the tythes in question should not be restored to the demandant; which *scire facias* was as well for the king as the party. It was enacted, that such writs should no longer be brought (a).

In the 25th year of the king there was another statute for the clergy, better known by the title of *Statutum de clero*, 25 Ed. III. st. 3. By the first chapter of this act, the king gave up all right to presentations that belonged to his ancestors in right of any other person. But having made this renunciation of right to enforce old claims, it was, in return, thought proper that the limitation which had been set by stat. 14 Ed. III. st. 4. c. 2. to his presentations (b), should be repealed; and so it was by ch. 2. of this act. Because the king sometimes made presentations upon untrue suggestions of clerks, where he had no right, it was ordained, that if at any time before judgment, it should appear upon examination that he had no right, the presentation should be instantly repealed, and the other party have all proper writs out of chancery to reinstate him in his rights (c). Again, after a lapse to the bishop, a judgment would sometimes be obtained by the king, through the collusion of the patron, in order to defraud the bishop of his right of presentation by lapse; and it was not the usage to admit the bishop or his clerk to defend the right, and

(a) Ch. 7.

(b) Vid. ant. 376.

(c) Ch. 3.

counterplead the king's title. To remedy this, it was enacted, that where bishops so presented, and then the king presented and brought his action against the patron, who suffered the king to recover without trying the right; in such case, the bishop should be received to counterplead the king's title, although he claimed nothing in the patronage (*a*). Because the ecclesiastical cognizance of avoidance of livings had been lately encroached upon by the secular justices, it was declared, that the said justices should receive challenges in favour of the clerical jurisdiction, when made by any bishop (*b*).

That bishops might not be brought into the danger of having their temporalities seized into the king's hands, so often as they had been, for contempts, in not obeying writs of *quare non admisit* (*c*), it was ordained, that the justices might receive a reasonable fine, according to the degree of the contempt, in lieu of such forfeiture (*d*). The remaining provisions of the statute *de clero*, concerning privilege of clergy and indictments, belong to another part of this work.

We have seen the jealousy entertained in the reign of Edward I. of foreign ecclesiastics, ^{Of provisors.} who were trying all means of draining church-property out of the kingdom: this was checked in some degree by the statute *de asportatis religiosorum*, made at *Carlisle* (*e*). At the time of that act, another method than that aimed at by the act, of conveying the riches of the church into the hands of foreigners, had grown into practice. The persons acting in this new device were called *provisors*: but though the parliament were then apprised of this new incroachment, no special regulation was made to restrain it, and it was left merely with the judgment of the legislature against it (*f*). Since that time this evil had

(*a*) Ch. 7. (*b*) Ch. 8. (*c*) Vid. ant. vol. I. 358. (*d*) Ch. 6.

(*e*) Vid. ant. 157, 376.

(*f*) For the description of provisors, vid. post. 380, 381. the preamble to the stat. of provisors.

grown to such a height, and so exasperated were the nation, that in the first year of this king's reign there was a petition from the commons, praying, that no alien *provisor*, nor any procurator for him, should come into the land, or go out of the realm or the king's power, in order to prosecute any *provision*, under pain of life and member; but the further consideration of this matter was adjourned till the king should come of age (*a*). We find nothing done on this subject by the legislature till the 25th year of the king, when complaint was again made of those "who purchase in the court of Rome *provisions* to have abbies and priories in England, in destruction of the realm and of holy religion." To remedy this it was then enacted, by a chapter at the latter end of the statute of purveyors, stat. 25 Ed. III. st. 5. c. 22. that whoever purchased such provisions of abbies or priories, both himself, his executors, and procurators, who sued and put in execution such provisions should be out of the king's protection, and be treated as the king's enemies; and all persons who did any wrong to the persons or property of such provisors, were to be liable to no action for the same.

In this manner did the parliament begin with these ecclesiastical offenders: but it did not stop here; for in the same year a special act was made, intituled, *A statute of provisors of benefices*, 25 Ed. III. st. 6. and again, in the very next parliament there was another statute of *provisors*, 27 Ed. III. st. 1. These two are the statutes of provisors mostly referred to on this subject, and prescribe the whole method of proceeding against such offenders, and others of the like sort.

The first of these statutes opens with a long preamble setting forth the grounds upon which such restrictions were to be justified, and the present necessity there was for making them. This preamble, together with the enacting part of the statute, gives a perfect idea, what *provision* and *pro-*

(*a*) Parl. Rot. 1 Ed. III. 26.

visors were; for which reason we shall state the substance of it, preferring this to any other account of these two words that might be extracted from writers of a later date, however learned or accurate; this being the method that has been adhered to through the whole of this History, to pursue the language of our statutes and law-books as the best guides in matters wholly of a legal nature, without recurring to the aid of modern writers, except on some very few and very particular occasions.

The preamble recites, that it had been shewn to the parliament of Carlisle, 35 Ed. I. that the church of England was founded by the kings and nobles of the realm, for their instruction and that of the people; and also for keeping up hospitality and alms and other works of charity in places where churches were founded; for which purposes, sees and rents to a great amount had been appropriated by the said founders to the prelates and other beneficed persons; from which resulted that right of collation and presentation claimed by the king and his nobles; and that the higher orders of such clergy constituted a considerable part of the king's great council, to advise him in national affairs. This being the nature and condition of the national church-establishment, it was considered as a great grievance, that the bishop of Rome, *accroaching* to himself the seigniories of such possessions and benefices, did grant the same benefices to aliens, who never dwelt in England; to cardinals, who by the rule of their order never could dwell here; and to others, as well aliens as denizens; as if he was patron, and had the advowson of such dignities and benefices, contrary to the known law of the kingdom; so that, in a short time, if the bishop of Rome went on in that manner, there would scarcely be a benefice in the realm that would not be in the hands either of aliens or denizens by virtue of such *provisions*, without the concurrence, and against the will, of the founders and pa-

trons of the advowsons, to the entire destruction of all the purposes for which such ecclesiastical establishments were made. It was therefore at that time adjudged, in full parliament, that such oppressions should not be suffered. The preamble of the statute goes on and recites, that in the present parliament, 25 Ed. III. a further complaint was made on this subject, namely, that the above-mentioned mischiefs daily increased more than ever; and that now of late the bishop of Rome, by procurement of clerks and otherwise, had *reserved*, and did daily reserve, to his collation, generally and specially, as well archbishoprics, bishoprics, abbies, and priories, as all other dignities and other benefices of England, which were of the advowson of people of holy church, and give the same as well to aliens as to denizens, and took of all such benefices the *first-fruits*, and many other profits, so that great part of the wealth of the country was expended in the purchase of such livings; and many clerks who had been presented by their lawful patrons, and had holden their benefices for a long time peaceably, were put out. To remedy all these mischiefs, and in pursuance of the opinion of the parliament in the 35th year of Edward I. it was now enacted as follows:

In the first place, it was enacted, that all elections to church preferments that were elective should be free, as in times past; and that all persons collated or presented should enjoy the same freely, in the manner in which they were *infeoffed* by their donors; secondly, in case any *reservation*, collation, or provision, was made by the see of Rome, of any church benefice, in disturbance of such free election, collation, or presentation, then, for that time, the king was to have the collation to such archbishoprics and other dignities as were elective, and of his advowson, in the same manner as his progenitors enjoyed it before free elections were granted, under certain forms and conditions;

such as, to demand of the king a *congé d'élire*, and after the election to have the king's assent, which, says the act, ought to be the form observed now; and if it was deviated from, and the conditions not kept, it was but reasonable, continues the act, that the thing should return to its first nature. In like manner, if it was of any house of religion of the king's advowson, the king was to have the collation for that time; and so also of any church, prebend, or benefice, of the advowson of any person of holy church. But if such houses of religion or church-benefices belonged to the advowson of any lord, or other person, then the collation, in the above cases, was to fall to him; and if such patrons did not present within half-a-year after the avoidance, nor the bishop by lapse within a month after such half-year, then the presentation was to belong to the king.

It was enacted, if the persons presented by the king or any of the before-mentioned patrons were disturbed by such *provisors*, that such provisors, their procurators, executors, and notaries, should be attached by their bodies, and brought in to answer; and if convicted, should abide in prison without bail or mainprize, till they had made fine and ransom to the king, at his will, and gree to the party grieved; and before they were released, they were to make renunciation, and find sufficient surety not to do the like in time to come, nor to sue any process by themselves, or by any other, at the court of Rome or elsewhere, on account of such imprisonment or renunciation, or other matter relating thereto. In case such provisors, procurators, executors, or notaries, were not found, the *exigent* was to run against them by due process, and writs were to issue to take their bodies, as well at the king's suit, as at that of the party. In the mean time, the king was to have the profits of such benefices so occupied by provisors, except abbies, priories, and other houses, that had colleges or convents; and in such houses the colleges or convents were to have the profits. In order to suppress these practices as soon

as possible, this statute was to relate as well to such collations in times past, as in time to come.

We have seen, that these provisors were to find security not to sue process in the court of Rome, with design to invalidate any of the regulations of the last act against provision. The suing in the court of Rome was another mischief that was heavily felt at this time, and loudly complained of, not only as a personal vexation to suitors, but as an infringement upon the law of the country, and the independence of the nation. To restrain these applications to a foreign tribunal, the following regulations were made by the stat. 27 Ed. III. st. 1. c. 1. which also is called in the statute-book, *A Statute of Provisors*. It was ordained, that all people of the king's ligeance, who should draw any one out of the realm in plea, the cognizance whereof belonged to the king's court, or concerning things whereof judgment had been given in the king's court; or who sued in another court, to defeat or impeach the judgments given in the king's court; should have a day, containing the space of two months, *by warning* to be made to them, in the place where the possessions in question lay, or where they had lands, or other possessions, by the sheriffs, or other the king's ministers, to appear before the king and his council, or in his chancery, or before the king's justices in the one or other bench, or before other justices deputed for that purpose, to answer in person to the king for the contempt; and if they came not at the day, then that they, their procurators, attornies, executors, notaries, and maintainers, should from that day be put out of the king's protection, their lands, goods, and chattels, forfeited to the king, and their bodies taken and imprisoned, and ransomed at the king's pleasure. Thereupon a writ was to be made to take their bodies, and to seize their lands, goods and possessions, into the king's hands; and if this writ was returned *non inventus*, they were to be put in exigent and outlawed. The ap-

Of Præmunire.

pearance of the offender any time before the outlawry was to intitle him to be received, to abide the judgment of the court, but such appearance was not to save the forfeiture.

The subject of *provisions*, and *citations* out of the court of Rome was taken up again, some few years after, and a new course was delineated for restraining practices so detrimental to individuals, and to the country at large: this was by stat. 38 Ed. III. st. 2. In the first place, the statutes 25 & 27 Ed. III. were thereby confirmed, except only that prelates and lords were not to be subject to the arrest or imprisonment which had been ordained by those acts. Further, in addition to those two acts, it was ordained, that persons who had purchased or obtained, at the court of Rome, citations against the king, or any of his subjects, or had procured deaneries, archdeaconries, provosties, and other dignities, offices, chapels, or benefices of holy church, belonging to the collation or gift of the king, or other lay patron of the realm; and also persons who obtained churches, chapels, offices, benefices, pensions, or rents, amortised, and appropriated to churches cathedral or collegiate, abbies, priories, chauntries, hospitals, or other poor houses; and also all maintainers and abettors of such persons, and those suspected of such pursuits, should be arrested and taken by the sheriff of the place, and justices in their sessions, deputies, bailiffs, and other the king's ministers, by good and sufficient mainprise, replevin, bail, or other surety (the shortest that might be) and be presented to the king, or his council, there to remain and stand to right, to receive what the law would give them; and if they were attainted of any of the above matters, they were to suffer the penalties ordained by stat. 25 Ed. III. beforementioned (a).

If a person suspected of any of the above offences was not within the realm, or could not be attached, he was to

(a) Ch. 1.

be proceeded against according to stat. 27 Ed. III (a). If any person attempted any thing against this statute, he was to be brought to answer in the above manner, and if found guilty, was to be out of the king's protection, and punished according to the stat. 27 Ed. III. On the other hand, all persons suing maliciously upon this statute were to be punished at the discretion of the king or his council. All the lords and commons bound themselves to see this act fully executed. Upon the stat. 27 Ed. III. was formed a writ to *garnish* or *warn* such offenders to appear; which writ was in after-times, from the initial word of it, called a *præmuneri*, or rather *præmunire, facias*; a piece of law Latin for *præmoneri facias, &c.*

The stat. 38 Ed. III. st. 1. c. 4. may be reckoned among the laws for restraining the clergy from drawing money out of the kingdom to the court of Rome. It says, that whereas many people were bound in *another court* out of the realm (namely, that of Rome) by instruments, and in other manner, *such* penal bonds in the third person (which form was peculiar to them) should be void.

Probate of wills and intestacy. To return to the 31st year of the king. The parliament had been frequently solicited to make some regulation about the probate of wills; a matter which had been managed by bishops' officers at their pleasure, without much regard to the duties of their trust, or the accommodation of the public (b); but nothing could be obtained, further than recommendations to the bishops to amend and correct abuses. In the 31st year, it was complained that the ministers of bishops and other ordinaries took grievous and outrageous fines for the probate of testaments, and for making acquittances thereof. Upon this a statute was made, stat. 31 Ed. III. st. 1. c. 4. ordaining, that as the king had charged the archbishop of Canterbury

(a) Ch. 2.

(b) Parl. Roll, 21 Ed. III. 51.

and other bishops to have this amended, if they neglected so to do, the king should cause his justices to enquire of such oppressions and extortions, and determine upon them, as well at his own suit, as at that of the party.

If a man died intestate, we have seen that the chattels went to the ordinary, who disposed of them as he pleased for the good of the deceased person's soul; but it was presumed the ordinary would answer all debts and demands upon such effects, to which he was also bound by the statute of Westm. 2 (a). However, as the law now stood, the relations, as it should seem, were entitled to nothing, at least in the *dead man's* part, whatever claim they might be thought to have in the other two-thirds. But this was put upon another footing by stat. 31 Ed. III. st. 2. c. 11. which ordains and declares, that where a person dies intestate, the ordinary shall depute *the next and most lawful friends* (b) of the intestate to administer his goods. In order to give the full effect to this trust, the statute ordains, that such *deputies* shall have an action to demand and recover as executors the debts due to the intestate, in the king's court, to administer and dispend them for the soul of the dead; the pretence under which they had in former times been claimed by the ordinary (c). These deputies were to answer also in the king's court to persons to whom the said dead person was *holden and bound* (that is, in obligations) in the same manner as executors should; and further, they were, like executors, to be accountable to the ordinaries. From this it seems, that the next friends of the deceased were to act merely as *deputies* to the ordinary, who was finally, as before, to have a sort of resulting trust in the overplus, besides the election and patronage of delegating the administration to such of the next friends as he pleased.

The next parliamentary regulation relating to the clergy, was stat. 36 Ed. III. st. 1. c. 8. which was occasioned

(a) Vid. ant. 167.

(b) *De plus prochains, et plus loiaux amis.*

(c) Vid. ant. vol. I. 308.

by the late plague, that had depopulated the church, as well as the laity. The priests having from thence taken occasion to make high demands for their service, certain limits were fixed by statute on the attendance of parish and other priests. The next was in matter of tythes. The clergy had claimed tythe of wood of the age of twenty years or more, when felled for ship-building or other uses, under the name of *sylva cædua*. Complaint of this had been often made to the parliament (a). It was declared, by stat. 45 Ed. III. c. 3. that a prohibition and attachment should lie in such case. Respecting prohibitions in general, it was ordained by stat. 50 Ed. III. c. 4. that where a *consultation* was once duly granted upon a prohibition made to a judge of holy church, the judge might proceed in the cause by virtue of that consultation, notwithstanding any other prohibition, provided the matter of the libel of the said cause was not engrossed, enlarged, or otherwise changed.

In the same parliament a new sanction was given to the privilege of person claimed by clerks. It was complained, that divers priests, *bearing the sweet body of our Lord Jesus Christ to sick people*, with their clerks, and other people of holy church, while they attended divine service in churches and church-yards, and other places dedicated to God, were often arrested; which, says the statute, was an offence to God, and a disturbance of divine service: it was therefore enacted, by ch. 5. of this statute, that the same should not be done in future. This is the last provision concerning the clergy in this reign.

The statutes of
labourers.

The great plague, which was just mentioned, gave origin to the first statute of labourers, which is the next subject that comes under consideration. This public calamity having thinned the lower class of people, servants and labourers took thence occasion to

(a) Cott. Abri. 21 Ed. III. 48.

demand very extravagant wages ; and rather than submit to work upon reasonable terms, they became vagabonds and idle beggars. It was found necessary to take some compulsory method, in order to reduce this rank of people to subordination ; an ordinance was therefore made by the king and council, to whom it was thought properly to belong, as an article of police and internal regulation, especially as the parliament were prevented from sitting by the violence of the plague. This ordinance was afterwards by stat. 2 Rich. II. st. 1. c. 8. made an act of parliament, and constitutes stat. 23 Ed. III. The contents of this act are well worthy of notice, as they are the first provisions of the sort, and they laid the foundation of that system of government to which this part of the community were subjected for many years after.

In the first place, it was ordained, that every man and woman, of whatsoever condition, free or bond, being of able body and within the age of threescore years, not being engaged in merchandize, and not exercising any craft ; neither having of his own whereof he might live, nor land of his own where he might employ himself in tillage, nor being in the service to any one ; every person of such description, if required to serve in a station that suited his condition, was to be bound to serve, when so required, for the wages and upon the terms that were usual in the five or six years preceding the 20th year of the king ; and any person so refusing, upon his refusal being proved by two true men before the sheriff or the king's bailiffs, or the constables of the town, was to be taken to the next gaol, there to be detained till he found surety for so serving (*a*). Any workman or servant departing from his service before the time agreed for, was to be imprisoned, and also those who received or retained such servant (*b*). All persons

(*a*) Ch. 1.

(*b*) Ch. 2.

paying or receiving, or demanding more than the above wages, were to forfeit double the sum (*a*); and lords of towns or manors so doing, to forfeit treble (*b*). Moreover, any artificer or workman refusing to work for the prices usual at the above-mentioned periods, ^{was} were to be committed to the next gaol (*c*).

In aid of this process for the regulation of the poor, it was also enacted, that provisions should be sold at a reasonable price, having respect to the price they bore in the places next adjoining; and any person selling for more, was to forfeit to the party damnified double the price taken. Mayors and bailiffs of cities and boroughs were to have authority to enquire of such offences; and if they neglected to act, and were convicted thereof before the king's justices, they were to forfeit treble the price to the party damnified, and to be fined to the king (*d*). Again, to prevent the poor from being encouraged to take to an idle life, in preference to working at some trade, it was ordained, that none, under pain of imprisonment, should give to such as could labour any thing in the way of alms or charity, nor in any manner favour them (*e*). Because it was found that people would not sue for the forfeiture against servants and workmen taking more than the above-mentioned wages, it was afterwards ordained, that such forfeiture should be assessed by the king's officers, to go in alleviation of so much of the dismes or quinzimes to be levied on the township (*f*).

In the 25th year of the king, the commons complained in parliament that the above ordinance was not observed; wherefore a statute was made, ordaining further regulations on the subject. It was enacted (*g*), that carters, ploughmen, and other servants should be allowed to serve by the year, or by some other usual term, and *not* by the

(*a*) Ch. 3.

(*b*) Ch. 4.

(*c*) Ch. 5.

(*d*) Ch. 6.

(*e*) Ch. 7.

(*f*) Ch. 8.

(*g*) 25 Ed. III. stat. 1.

day. All workmen were to bring their implements openly into towns, and there be hired in a common place, and by no means in a secret one (*a*). Certain prices were fixed for a day's work of mowers, reapers, and others. Servants were to be sworn twice a-year before the lords, stewards, bailiffs, and constables of every town, to observe these ordinances; and those who refused to take such oath, or to perform the work they engaged for, were to be put in the *stocks* by the above officers, for three days or more, or to be sent to the next gaol, there to remain till they would justify themselves (*b*). As the wages of servants in husbandry were settled by the above chapter, that of certain artificers, as masons, carpenters, and the like, were likewise ascertained; and power was given to the justices thereto assigned to lower the rate of such wages at their discretion (*c*). It was further enacted, generally, that *all other servants* not expressly named in the act, should be sworn before the justices to exercise their crafts as before the 20th year of the king; and any servant, workman, labourer, or artificer, acting contrary to such oath, was to be punished with imprisonment and fine, at the discretion of the aforesaid justices (*d*). The above officers were to be sworn before the justices to execute this statute; and the justices at their sessions were to make enquiry therein, and award process of *exigent* after the first *capias* against offenders (*e*). The justices for the execution of this act were to hold their sessions four times a-year at least; that is, at the Annunciation, on St. Margaret, St. Michael, and St. Nicholas's day; and also as often as they in their discretions should think needful (*f*). The commission to execute the statute of labourers was usually directed to the same persons who were in the commission of the peace; the due

(*a*) Ch. I.(*b*) Ch. 2.(*c*) Ch. 3.(*d*) Ch. 4.(*e*) Ch. 5.(*f*) Ch. 7.

ordering of such persons as were the objects of this statute being one of the most important articles in the police of the country.

Again, by stat. 34 Ed. III. c. 10. it was ordained, that labourers and artificers who absented themselves from their services, should be branded with a hot iron on the forehead with the mark of the letter *F*, to denote the *falsity* they had been guilty of, in breaking the oath by which they had bound themselves, according to the former statute, to serve; though this stigma might be dispensed with by the justices. Further, a servant, labourer, or artificer, who had absented himself, might be demanded of the mayor or bailiffs of the place: if they refused to deliver him up, they might be sued before the *justices of labourers*, and if convicted were to forfeit 10*l.* to the king, and 100 shillings to the party grieved. This was to prevent such fugitives from being harboured, and to interest all persons in enforcing this statute. To promote the executions of these provisions, it was moreover ordained, by stat. 36 Ed. III. st. 1. c. 14. that the fines arising from the penalties inflicted under the statutes of labourers, instead of going into the exchequer in part of the king's taxes, as directed by a former act, should be distributed among the inhabitants by the collectors, under the controul and account of the justices of the peace. Thus far of the statutes of labourers.

Trade and commerce. Trade and commerce had been patronized by our kings, and encouraged by our legislature, in the earliest times of our History; of which, without looking further back, the indemnity and protection held forth to foreign merchants by *Magna Charta* (a), is a manifest instance. The great productions of this country, and which were objects of commerce with foreign nations, were wool and lead. Many regulations had been

(a) Vid. ant. vol. I. 234

devised by our kings to make the advantage of this traffic center in the kingdom. Some of these consisted in markets, or *staples*, as they were called, where the buying and selling of these articles was put under certain terms. Of these staples, some were in England, and some beyond sea. All these were experiments on the commerce of the kingdom, a subject not then well understood; and as the experience of times varied, the policy of national trade took a different turn. In the early part of this reign it was enacted, by stat. 2 Ed. III. c. 9. that the staples, whether beyond sea or in the kingdom, should cease; and that all merchants, as well aliens as natives, should go and come with their merchandize in England according to the Great Charter.

In the 27th year of the king, other notions prevailed concerning the vent of the national produce. It was thought expedient to confine the mart or *staple* to certain great towns in England, where foreigners might resort to purchase, and that no Englishman should, under great penalties, export these commodities himself. It was thought the trade conducted in this manner would bring more wealth into the country, than if transacted by the English on the Continent. Upon this idea was made *the statute of the staple*, 27 Ed. III. st. 2. a constitution containing a set of regulations for the establishment and government of the staple. As many of these are wholly of a mercantile import, and are now become obsolete, they are not objects of curiosity to an historical lawyer; but others, that are of a judicial nature, are not, because out of use, less within the compass of this work, as they shew the turn and modifications which have, on particular occasions, and for particular purposes, been given to our laws, to accommodate them to the ends of justice in all cases. As the staple was intended, in its very institution, for the resort of foreign merchants, it was wise and expe-

- dient that some mode of administering justice between parties should be devised, which would be more consonant with the ideas of foreigners, and more adapted to the nature of mercantile transactions, for ease and dispatch, than the common process of the law (*a*). To these we shall principally confine ourselves in considering the statute of the staple, noticing little more of the remainder of the act than will be necessary to make them intelligible.

The statute begins by enacting, that the staple of wools, leather, woolfels, and lead, produced in England, should be held at the following places: for England, at Newcastle upon Tyne, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, and Bristol; for Wales, at Kaermerdyn; and for Ireland, at Dublin, Waterford, Cork, and Drogheda, and no where else. All the above articles were to be brought to these places, and there sold (*b*). In order that this whole business might be transacted at the staple, it was ordained, that no merchant, English, Welch, or Irish, should carry out of the realm any of the above articles, on pain of life and limb, of forfeiture of the merchandize, and of other their goods and chattels to the king, and their lands and tenements to the chief lord. There were proper guards in the act to prevent any collusion or fraud, by the interference of foreign merchants, to give colour to exports really made by English (*c*), the great object being to bring foreigners into the country.

In order that disputes might be decided among merchants in the staple conformably with their own ideas, it was enacted, that the justices of either bench, of eyre, of assise, or the marshalsea, or any other justices, if they came to the places where the staples were, should not interfere or have cognizance of such things as were within the jurisdiction of the mayor and ministers of the staple (*d*). The

(*a*) Vid. ant. vol. I. 407.

(*b*) Ch. 1.

(*c*) Ch. 3.

(*d*) Ch. 5.

jurisdiction of the mayors and constables of the staple was declared in this way: they were to have cognizance within the town where the staples were, of people, and of all manner of things touching the staple. All merchants coming to the staple, and their servants, were to be governed by the *law-merchant* in all things touching the staple, and not by the common law of the land, nor by the usage of cities, boroughs, or other towns; nor were they to implead, or be impleaded before the justices of such places, in pleas of *debt*, *covenant*, and *trespass*, of things touching the staple; but were to implead all persons, as well those who were not of the staple, as those who were, being found therein; and were to be impleaded only before the mayor and justices of the staple, of all manner of pleas and actions, whereof the cognizance belonged to the staple. Again, in all contracts whatsoever between merchant and merchant, or other, if one party was a merchant, whether the contract was made within the staple or without; and also of trespass done within the staple to merchants or ministers of the staple by any stranger, or by any of them against a stranger, the plaintiff might either sue in the staple, or at common law.

In pleas relating to the king's house, the steward and marshal of the household were to sit with the mayor, to see right done. All pleas of land were to be at the common law. If any merchant committed felony, or was slain, robbed, or maimed, the mayor of the staple and other proper persons were to be assigned justices, to hear and determine the matter within the staple according to the common law; and if an indictment was taken without the staple of a fact committed within, it was to be transmitted to the mayor and the justices assigned within the staple. If a matter was to be tried by an inquest within the staple, and the parties were both strangers, it was to be tried by strangers; if denizens, by denizens: if one was an alien,

and the other a denizen, then the inquest was to consist of half denizens and half aliens (*a*).

In order that contracts made within the staple might be better observed, and payments readily obtained, a course similar to a statute-merchant was directed. The mayor of the staple was empowered to take recognizances of debts which any one would enter into before him, in the presence of the constables of the staple, or one of them. There was to be in every staple a seal, to be kept by the mayor, and all obligations made upon such recognizances were to be sealed with that seal: by virtue of such sealed obligation, the mayor might hold in prison the body of the debtor, after the time of payment had arrived, if he was found within the bounds of the staple; and there he was to be detained till he had made agreement with the creditor for the debt and damage: he might also take his goods found within the staple, and deliver them, by true estimation, to the creditor, or sell them to the best advantage, and pay the debt. In case the debtor, or his goods to the amount of the debt, were not found within the staple, a certificate was to be made to the chancery, under the mayor's seal; upon which a writ would be issued to arrest the debtor's body, without mainprise, and to seize his lands and tenements, goods and chattels. This writ being returned into chancery, with a certificate of the value of the lands and goods, due execution was thereupon to be made in the same manner as was prescribed by the statute-merchant; so that the creditor should have an estate of freehold in the lands and tenements delivered to him by virtue of the process, and recovery by writ of novel disseisin, if ousted; but the debtor was to have no advantage of the quarter of a year allowed by the statute-merchant (*b*).

(*a*) Ch. 8.

(*b*) Ch. 9.

A piece of old law, which had been abolished in the reign of Edward I. (*a*) had been revived in this reign in the case of the Lombard merchants. It was found that Lombard merchants, with which the kingdom at this time abounded, would sometimes escape out of the country, without satisfying their creditors. In order to interest all the community in preventing such frauds, it had been enacted by stat. 25 Ed. III. st. 5. c. 23. that if any merchant of the company of Lombards acknowledged himself bound in a debt, the company should answer for it; provided, however, that a merchant *not* of the company should not be liable. The spirit of this proviso was carried into full execution by the present statute; for it was ordained, that no merchant-stranger should be impeached for another's trespass or debt, wherein he was neither debtor, pledge, nor mainpernor (*b*). It was enacted, that justice should be administered in the staple from day to day, and from hour to hour, whenever complaint was made; that merchants, whose occupations required them to be passing and repassing the sea, might not be delayed unnecessarily (*c*). In every staple town the mayor was to be chosen yearly; and he was to be well acquainted with the law-merchant, to qualify him for the government of such a concern. There were to be at least two constables. All complaints against the mayor and constables were to be redressed upon complaint to the chancellor and council (*d*).

These are the judicial parts of the statute of the staple. Some small alteration was afterwards made in the jurisdiction of the mayor and constables: for whereas it had been ordained, generally, that they should have cognizance within the towns where the staple was, of the people, and of all manner of things touching the staple, and of felonies, mayhems, and trespass done within the staple, it was thus altered by stat. 36 Ed. III. st. 1. c. 7. namely, that they

(*a*) Vid. ant. 114.

(*b*) Ch. 17.

(*c*) Ch. 19.

(*d*) Ch. 21.

should have cognizance only of debts, covenants, and contracts, and all other pleas touching merchandize, and surety of merchandize between merchants; but process of felony, and all other pleas, as well within the staple as without, were to be at the common law; as they were before the statute of the staple; with this exception, that merchants *alien*, whether plaintiffs or defendants, might sue plaints, as well of trespass as any other matter, before the mayor of the staple, by the law of the staple, or at the common law. Some other statutes were made respecting the trade of the staple, which are not much worthy of notice; as stat. 28 Ed. III. c. 14, 15. and stat. 31 Ed. III. st. 1. c. 7.

Other laws were enacted for the encouragement of trade and manufactures, particularly that of woollen. It had hitherto been the course of trade, to suffer our wool to be exported into the Low Countries to be manufactured; but it being thought more conducive to the welfare of the nation to manufacture it at home, some laws were made first to give protection to such cloth-makers as would come to reside here from foreign parts (*a*); secondly, to restrain the wearing of any cloths but such as were made in *England, Ireland, or Wales*. This measure was first commenced in the 11th year of the king. When manufactures were thus set on foot, the next step was to attend to the quality of their productions, which occasioned the *statute of cloths*, 25 Ed. III. st. 4. prescribing the size, texture, and properties of cloths: this act was followed by others (*b*).

It was not to the natural productions of the king's dominions that the parliament confined their attention. They endeavoured, in various ways, so to regulate other articles of commerce, both import and export, as to keep up the orderly and regular course which must be preserved in

(*a*) Stat. 11 Ed. III. c. 5.

(*b*) Stat. 27 Ed. III.

commerce, if intended to be permanently beneficial. Among other circumstances of trade, *forestalling* was restrained, as prejudicial to the fair trader. Forestallers of wine, victual, wares, and merchandizes, if attainted at the king's suit, or that of any other, by indictment or otherwise, were to forfeit to the king the thing forestalled; and if that was sold, and the party had not whereof to make fine, he was to suffer two years imprisonment (a). *Ingrossing* likewise was restrained: merchants ingrossing were to forfeit the thing ingrossed, and also pay a fine (b). Besides those above-mentioned, to compel labourers and artificers to work, many laws were made to direct persons who were industrious to their proper object. Artificers and handicraftsmen were to confine themselves to one trade only, in order that they might excel the better therein (c). The sumptuary regulations that were made by stat. 37 Ed. III. may be considered as a branch of the laws concerning trade and manufacture. By that act, the apparel of almost all ranks of persons in the state, from knights and esquires down to workmen and servants, was prescribed; so that no whim or extravagance of dress might be indulged to the ruin of the wearer (d). This scheme of *æconomy* went so far as to the diet of the inferior sort.

While so much solicitude was expressed for the interest and welfare of trade, no less regard was shewn to that great medium of it, *money*. No *sterling*, nor silver in plate, nor vessel of gold, was to be carried out of *England*, under pain of forfeiting the same, unless the king's special licence was obtained (e). No sterling halfpenny or farthing was to be melted; and any goldsmith or other so doing, was to be committed to prison till he paid to the king the value of that which he had melted (f). The importing of false

(a) Stat. 25 Ed. III. st. 4. c. 3. (b) Stat. 37 Ed. III. c. 5. (c) Stat. 37 Ed. III. c. 6. (d) Ch. 8, 9, 10, 11, 12, 13, 14, 15. (e) Stat. 9 Ed. III. st. 1. c. 1. (f) Ch. 3.

money was by stat. 9 Ed. III. punished by forfeiture thereof (*a*); but we shall hereafter see, that in the 25th year of the king it was made high-treason. Proper authority was given to search for false money suspected to be imported (*b*). Many other laws were made on the subject of the coin, all now of very little importance (*c*).

Before we come to those statutes that relate to the administration of justice, it will be proper to mention some few which do not strictly belong to that head, nor to any of the foregoing: one of these was for the denization of children born beyond sea, one relating to *non-claim* upon fines, and another concerning fraudulent assurances.

Children born out of the realm. The stat. 25 Ed. III. st. 2. was made to remove some doubt which was entertained about the denization of children born of English parents out of the kingdom; for which purpose the statute explicitly declares the law of England always to have been, that the children of the kings of England, whether born in the kingdom or without, ought to have the inheritance after the death of their ancestors: and respecting others, it declares, generally, that all children inheritors who should thenceforth be born out of the king's ligeance, if their fathers and mothers, at the time of their birth, were of the faith and allegiance of the king of England, should enjoy the same benefits and advantages, to have and bear their inheritances within the king's allegiance, as well as those born within the allegiance of England; provided their mothers passed the seas with the licence and wills of their husbands. And because there was some doubt about children born at *Calais*, that place not being out of the king's ligeance, it was declared by stat. 42 Ed. III. c. 10. that they should be held within the benefit of the above law.

(*a*) Ch. 2. (*b*) Ch. 9, 10, 11. (*c*) Stat. 25 Ed. III. st. 5. c. 12.
13. 20. stat. 15 Ed. III. c. 6.

It was the old law of the land, that a fine properly levied in court should bind all parties who did not make their claim within a year and a day; and this was recognized and confirmed by the statute of *Modus levandi fines*, 18 Ed. I (a). The great principle upon which *fines* were to be defended, was the peace and quiet thereby given to the possession of property; though a solicitude not to preclude any one from obtaining justice, if he had a lawful *claim*, dictated the indulgence of a year to make it in. In this reign, the desire of being always at liberty to do justice seems to have got the ascendant over that to preserve quiet; for it was at the distance of twelve years from the petition for that purpose (b), ordained by stat. 34 Ed. III. c. 16. that the plea of *non-claim* of fines Statute of non-claim. should not be taken nor holden for a bar in time to come. The endless litigation to which property was subjected after this law, produced an alteration in the reign of Richard III. and of Henry VII. when the doctrine of *non-claim* was revived, with respect to fines levied in a particular manner.

The last act but two in this long reign is upon a subject which will be more fully discussed in the subsequent parts of our History; namely, *the possession of land by one man to the use of another*. In what degree this practice of modifying property had obtained at the time of which we are now speaking, may perhaps be collected from a recital of the statute itself. The stat. 50 Ed. III. c. 6, complains, that many people inheriting divers tenements, borrow goods in money or merchandize, and then give their tenements and chattels to their friends, *by collusion, thereof to have the profits at their will*, and afterwards flee to the franchise of *Westminster*, of *St. Martin-Le-Grand* in *London*, or other privileged place, and there live a great time *with high countenance, of another man's goods, and profits of the said*

(a) Vid. ant. 224.

(b) Cott. Abr. 22 Ed. III. 21.

tenements and chattels, till their creditors are glad to take a small part of the debt, and release the remainder. This was the grievance meant to be remedied; for which end the statute ordains, that should such gifts be found to be made by collusion, the creditors should have execution of the tenements and chattels, as if no such gift had been made. One would have thought a stroke like this, as it wholly destroyed the end of such confidential gifts, needed not to have been repeated; but such was the ingenuity and perseverance of mankind, that these collusive gifts rather increased after this act, and were carried to such lengths as to baffle the operation of many statutes framed more specially and upon better experience than the present.

To the account that is to be given of the alterations made in the administration of justice, it may be convenient to prefix a short view of the laws enacted for the better regulations of some offices immediately connected with, and assistant to, courts of justice; such as those of the sheriffs, coroners, bailiffs, and the like.

Of sheriffs. First, of sheriffs. The statute of Lincoln, 9 Ed. II. st. 2. directing that sheriffs, hundredors, and bailiffs, should be chosen from such persons as had lands in the same shires or bailiwicks, and that sheriffs and bailiffs of fee should cause their counties and bailiwicks to be kept by such as had lands therein, was a provision so well calculated to promote the dignity of the office, that it was required by stat. 2 Ed. III. c. 4. and in the next parliament by stat. 4 Ed. III. c. 9. to be strictly observed: the same was more explicitly re-enacted by stat. 5 Ed. III. c. 4. which requires the lands to be sufficient to answer to the king and his people, if grieved.

The farming of counties and hundreds led to much oppression and disorder. It seems, that in former times all the counties in England were assessed to a certain ferm; and all the hundreds and wapentakes in the sheriff's hands were rated to this ferm. Afterwards, says the act, appro-

vors were sent into some counties, who increased the farms of some hundreds and wapentakes, notwithstanding the crown had, at divers times, granted out parts of the same hundreds and wapentakes for the old farms only; but now of late the sheriffs had been charged with the whole increase, amounting to a great sum, which was a sort of disherison to sheriffs, and tending to the oppression of the people. It was thought this would be remedied by annexing to the counties such hundreds and wapentakes as had been lett by the present king; and this was done by stat. 2 Ed. III. c. 12. which also directs that they should never again be severed. Again, because sheriffs had lett hundreds and wapentakes at so high a farm that the bailiffs could not pay the farm without extortion and mal-practices, it was enacted by stat. 4 Ed. III. c. 15. that sheriffs should lett them at the old farm, and not above; and if they did, they were to be punished by the justices.

To prevent one instance of extortion, it was enacted, by stat. 4 Ed. III. c. 10. that sheriffs and gaolers should receive and safely keep all thieves and felons delivered to them by constables and townships, without taking any thing for so doing; and they were to be punished by the justices of gaol-delivery, if they acted otherwise.

In the 14th year of the king, the office of sheriffs underwent a fuller consideration, and some provisions of a more general nature were devised for the reformation of it. It had been the practice for sheriffs sometimes to have grants of their bailiwick from the king for term of years: this was found to render them more secure in their misconduct, and all the evils complained of became thereby more inveterate. It was now ordained, that in future no sheriff should continue in office more than a year, and then a new one should be appointed in his place by the chancellor, treasurer, and chief baron of the exchequer, taking to them the two chief justices, if they were present: this was to be done on the morrow of *All Souls*, at the exche-

quer (a). Besides re-enacting the before-mentioned provisions about letting hundreds to ferm, it was ordained, that sheriffs should put in bailiffs and hundredors, having lands within the bailiwick, for whom they would answer. The sheriff's business was to be done by such bailiffs and hundredors and their under-bailiffs, without any *out-riders*, as they were called, and others who had lately been employed by sheriffs, and had committed great excesses: the same of *bailiffs-errant*, as they were termed, who were no longer to be in counties, but where they were used in the time of Edward I. and no more than one in a county. These *bailiffs-errant* and *out-riders* were deputies to the above officers; and as they were on that account less responsible, so were they more iniquitous in their employments. All others who had bailiwicks or hundreds in fee, were to put in such bailiffs as they would answer for; and if they lett them, it was to be on the old ferm. If sheriffs, or their fermors, offended against this act, the hundreds and wapentakes where the default was, were to be seized into the king's hand, and themselves committed to prison till they had made fine to the king: the same of those who had bailiwicks in fee, upon default of their bailiffs (b): sheriffs were also to put in such gaolers as they would answer for (c).

Notwithstanding *Magna Charta* had directed that sheriffs should hold their tourn after *Easter*, and after *Michaelmas*; yet it seems some sheriffs, not attending to that act, held their tourn sometimes in *Lent*, and sometimes after the *Yule of August*; seasons heretofore set apart for devotion and harvest. It was therefore enacted, by stat. 31 Ed. III. st. 1. c. 15. that the tourn should be held twice a-year; once within a month after *Easter*, and once within a month after *Michaelmas*; and if a sheriff held it any otherwise, he was to lose his tourn for the time. The last act about sheriffs in this reign was stat. 42 Ed. III. c. 9. which,

(a) Ch. 7. confirmed by stat. 28 Ed. III. c. 7.

(b) Ch. 9.

(c) Ch. 10.

besides some directions about transmitting their estreats into the exchequer, ordains, not only that no sheriff, but that no under-sheriff, nor sheriff's clerk, should abide in his office more than a year.

As to coroners, it was enacted by stat. 14 Ed. III. st. 1. c. 8. that no coroner should be chosen unless he had lands in fee in the same county, sufficient to enable him to answer the people. Again, all coroners were to be chosen in full county by the commons of the county, of the most meet and lawful people that were to be found in the county, to execute the office, except in cases where the king or any lord, by his franchise, had a right to appoint(a).

(a) Stat. 28 Ed. III. c. 6.

CHAP. XIV.

EDWARD III.

Judicature in Parliament—in Council—The Court of the Steward and Marshal—The King's Bench—Error in the Exchequer—Justices of Assise and Nisi Prius, &c.—Attaints—Process of Outlawry—Execution of Writs—Qualifications of Jurors—Law Wager—Statute of Jeofail—Pleadings to be in English—Statute of Treasons—Riots—Of Indictments—A Jury de Medietate Linguae—The Benefit of Clergy—Of Pardons—Process of Capias & Exigent—Origin of Justices of the Peace.

SEVERAL regulations were made by the parliament in this reign, for the better and more regular administration of justice. These consisted partly in a new disposition or arrangement of the courts, and partly in providing new remedies. We shall first speak of the former.

The most striking change made in any of the courts was that which regarded the high court of parliament. The judicature exercised by this supreme tribunal has been explained in the former part of this History (a). What was then said, was founded upon the testimony of very scanty materials, confirmed by the analogy observed in cotemporary judicatures, and the experience of later times. To those later times we are now arrived. In the reigns of Edward I. II. and III. we find records of proceedings in parliament, which incontestably verify what was before delivered on the judicial character of this as-

(a) Vid. ant. vol. I. 61.

sembly, and furnish materials for forming an accurate judgment of its judicature, whether civil or criminal. From them also may be collected some intimation of the judicature of the council, and the way in which that court, and the courts of exchequer, king's-bench, chancery, and common-pleas, were connected with, and dependent upon the court of parliament. If we had adhered in this instance to the method we have rigorously pursued in all other parts of our historical deduction, that is, to take notice of juridical facts as early as the remains of antiquity afford any notice of them, we should have introduced the present observations in the reign of Edward I.; but they were deferred to avoid repetition, and to accommodate the narrative to the reader's attention; which, as it was necessarily to be much engaged, in this reign, on the alterations made in the court of parliament, it was thought, would be better prepared for such alterations by a statement of the whole subject at the time, than by scattering it in different places. It must therefore be understood, that what is now said of the jurisdiction of the court of parliament is equally applicable to the reigns of Edward I. and II. and indeed, as we conjecture, to all the reigns preceding, from the origin of the Norman constitution.

The great extent of the jurisdiction of parliament in judicial matters, seems owing to the idea of superintendence and supremacy attributed to that assembly by the people. It was thought, that the parliament was to redress all wrongs, to remedy all abuses, and remove all difficulties, with which a man was pressed either in his person or property. In consequence of this notion it happened, at every meeting of parliament, that *petitions* poured in from all quarters, not only upon subjects of public and national concern, but for relief in private affairs. These petitions were exhibited by all sorts of persons, upon all sorts of matters, and to obtain every species of relief which the petitioners thought

most desirable in their situations. When petitions were so numerous, and the objects of them so multifarious, it could not but happen that many were frivolous, and many were such as evidently belonged to another jurisdiction. To distinguish between those that were properly within the cognizance of parliament, and those that were not; and also in order that those which belonged to other courts, might be duly remitted thither; certain prelates, earls, barons, and others, were appointed in every parliament to be *recievors and tryors of petitions*. These were to examine all petitions, and upon full consideration thereof, were to indorse upon them what course was to be pursued by the petitioner to obtain redress; referring him, according to the nature of the case, either to the full parliament, to the council, to the chancery, or to some of the other courts. It was for this reason that *the recievors and tryors of petitions* are ranked by Fleta among the king's courts; though, as he says, their business was not to determine, but only to hear and examine, and make their report (*a*). This is the outline of the court of parliament, the features of which deserve further consideration.

There was one circumstance common to all these petitions, that they were addressed either *a nostre seignour le roi, et a son conseil*, &c. or to the king singly, without naming the council at all; though the former was the more common form. As to the matter of these petitions, it will be difficult and unnecessary to speak of them particularly: the curious reader, by casting his eye over the parliament-rolls of this and the two preceding reigns, will judge whether what was above said of the extent of this judicature is well founded. Petitions were infinite as to the particular objects of them; but they may be divided into two general heads; namely, such as were the original commence-

(*a*) Vid. ant. 247.

ment of a suit, and such as complained of error or delay in any suit depending in the courts below.

The manner in which petitions were treated, is best seen by the answers they received. Petitions that were originally for redress, very commonly contained matter which was properly cognizable only at common law; in such case *the recievors and tryors*, upon examination of the matter, would indorse the following answers: *Sue a la comein ley, sue brief de trespas, et aixi de manace s'il vou* (a); and the like. If it was in some matter of the revenue, the answer would be, *Soit mande as tresorer, et barons de l'exchequer, que viewes et serches les roules et remembrances de l'exchequer, et aissi appelé aucuns de justices, s'il besoigne, facent outre en discharge le dit——et que ley et reson demandent* (b). If the petition related to any of the king's charters or grants, the reference was usually to the chancery, which seemed to have a nearer connexion with the council than the other courts. An answer to one petition is thus: *Soit ceste petition mande en chancellerie, et illoeq; soient bons genz assignez d'enquere, en la presence des auscuns de la chambre, s'ils y veuillent estre, si les choses contenue en la petition soit veritables: et l'enqueste issint prise, et retourne en chauncellerie, le chaunceller vene le fait, &c.* (c) *et, appelez le seneschal de la chambre, ou son lieutenants, et les serjeantz le roi, et auscuns des justices, solonc ce qu'il verra que soit a faire, et oiez les resons pur le roi et pur la partie, face outre droit et reson.* To another: *Soit ceste petition maunde en chancellerie, et illoeq; appelle le counsail la roigne, et oiez les resons d'une part et d'autre, soit ent outre fait droit* (d). If it was a matter proper for the cognizance of the council, an answer to this effect used to be given: *Veigne devant la counsaile et declare la matere contenue en la petition.*

These are some instances, out of many others, of the

(a) 21 Ed. III. Pet. Parl. 24. No.

(b) Ibid.

(c) Ibid. 69.

(d) Ibid. 70.

manner in which the parliament dismissed certain applications for redress. The petitions themselves are rather examples of what the people expected from the parliament, than of the jurisdiction really exercised by it. Among the petitions to parliament we find some indorsed with these answers: *Coram rege & magno concilio*; and sometimes an answer concluded with these words, *et issint fuit respondu en plein parlement*. These and the like answers, it should seem, signified that the parliament had heard and decided upon the petition judicially, by a solemn judgment and an award made upon it. Matters that were determined in this manner by the parliament were those for which the common law had no remedy, or which were of too great importance to be referred to the council, the other tribunal, next the parliament, for supplying the defects of the common law. In this way were *original* petitions in parliament exhibited and disposed of.

The manner in which petitions for direction in suits depending in the courts were entertained by parliament, will appear from a few instances where such interposition was made. In the 21st year of this reign there is a petition to the king and council, stating that the parties were impleaded by writ of *scire facias* before the justices of the common bench; which plea had been six years depending, and the judges could not yet agree upon the judgment, though they had been frequently commanded by the king so to do; the petitioners therefore, stating themselves to be greatly aggrieved by such delay, prayed the king that he would command the chancellor, or the clerk of the privy-seal, to send a writ to the justices to cause the record in the said plea to come into full parliament, that the matter upon which they doubted might be debated before the peers of the land, and so might be finally determined by their advice and that of other learned men (a): the answer to which was,

(a) 21 Ed. III. Pet. Parl. 82.

that the record and process should be brought before the council, and upon view thereof, due discussion should be had. Many instances of such applications to parliament might be produced (*a*).

It was not only by petition of the parties that suits depending in the courts below were brought into parliament, but also on the motion of the judges themselves, who, in cases of doubt and difficulty, would rather take the advice of the parliament, than hazard their own judgment. In the 40th year of this king (*b*), *Thorpe* says, that he and Sir *Hugh Green* went together to the parliament, where there were present at least twenty-four bishops and earls, and asked the opinion of those who had been the makers of the late statute of jeofail, concerning the alteration of a record. "At another time," the same judge says (*c*), "we were commanded by the council, that when any case of doubt should happen, we should not go to judgment without good advice: therefore, (adds he, in the case then before the court) go to the parliament (*d*), and as they will have us do, we will, and otherwise not." Instances of this kind of reference were frequent in this reign, when the constant sitting of that assembly afforded more opportunity for this intercourse, than in any of the former periods. It was in the spirit, and in pursuance of the practice then in use, that the famous statute of treason, 25 Ed. III. ordains, that when any new case of supposed treason should arise, not precisely within the terms of that act, the judges should not proceed upon their own conceptions, but should take the opinion of the next parliament.

What we have been saying of petitions in parliament related chiefly to civil affairs. It was not less common to petition parliament in criminal matters: upon which the

(*a*) See Cotton Abri. pa. 30. a long case reported. (*b*) 40 Ed. III. 34.

(*c*) 39 Ed. III. Mich. 35. (*d*) Counsel.

parties would be directed to sue a writ of oyer and terminer, or take such other steps according to their case, as the common law prescribed. But criminal prosecutions were instituted in parliament in another way than by petition. The lords constituted a great inquest, which was to present and try each other. There are numberless instances of such a jurisdiction all through this reign. In the fourth year we find a string of articles charging *Roger Mortimer* with certain treasons, felonies, and misdemeanors. At the end of the record it is said, that the king charged the earls, barons, and peers of the realm, with the same; upon which the said earls, barons, and peers, having examined all the articles, returned back to the king in the same parliament, and all pronounced by the mouth of one of them, that the matter contained in those articles was notorious to them and to all the people: wherefore they, the said earls, barons, and peers, as judges of parliament, by assent of the king in the same parliament, awarded and adjudged, that the said Roger should be drawn and hanged as a traitor; and order was accordingly given to the earl marshal to execute the sentence(*a*). It appears very clearly from this case *who* were the judges in such parliamentary trials; namely, that the lords were to sit in judgment on each other, as peers. But the enormity of the offence which was to be punished in this parliament, and which was nothing less than the murder of the late king, excited a sort of resentment in the parliament, and carried them further than the lawful bounds of their jurisdiction; for they passed sentence of death upon several commoners. To prevent, however, this being drawn into precedent in future, the parliament caused the following memorandum to be entered on the roll: That it was assented and agreed by the

(*a*) 4 Ed. III. 1. Roll. Parl.

king, *et toutz les grantz*, in full parliament, that though the peers had taken upon them to give judgment, with the king's assent, upon certain persons who were not peers, yet no peers in future should be held or charged to give judgment on any other than their peers (a).

In conformity with this resolution, it appears in the same parliament, among the *placita coronæ*, when Sir *Thomas Berkeley* was to be tried for the same offence of murdering the king, and he alleged he was out of Berkeley-castle at the time, and therefore not consenting to the murder, that the record runs thus: *de hoc, de bono et malo ponit se SUPER PATRIAM. Ideo venerunt inde JURATORES coram domino rege in parlamento suo, &c.* (b)

All these prosecutions in parliament were brought forward by articles exhibited; but who were the persons appointed to exhibit such articles, and to stand forth as prosecutors, does not appear. Towards the latter end of this reign the commons took this burthen upon themselves; and among their other petitions, began to exhibit *accusations* for crimes and misdemeanors against offenders who were thought to be out of the reach of the ordinary course of the law. In these prosecutions the king and lords were considered as judges. The first of these is in the 42d year of the king, when Sir *John Lee* was impeached by the commons for mal-practices while steward of the household, and for fraud in some private transactions; concerning all which he was heard before the *great council* (c). In the 50th year the commons preferred impeachments against many delinquents, and these were tried by the lords. Thus was this formidable mode of prosecution by impeachment of the commons first set on foot.

(a) 4 Ed. III. Roll. Parl. 6.

(b) Ibid. 16.

(c) 42 Ed. III. Rot. Parl. 20.

Judicature in council. The tribunal next in authority to the parliament was *the council*. As the parliament was often called by this name, and there was besides more than one assembly of persons called *the council*, much difficulty has arisen in endeavouring to distinguish between them. We have seen, that petitions to parliament in private matters were addressed *a nostre seignour le roi, et a son conseil*. The king had a council which consisted of all the lords and peers of the realm, who, it should seem, were called together by him at times when the parliament was not sitting: this was called the *grand council*, as well as the parliament (being probably the original *commune concilium regni*, before the commons were summoned thither), and was so termed to distinguish it from the other *council*, which the king used to have most commonly about him for advice in matters of law. This last council (which in effect approached very near to what has since been called the *privy council*) consisted of the treasurer, chancellor, justices, barons, the keeper of the rolls, the masters in chancery, the chamberlains of the exchequer, justices in eyre, justices assigned, justices in Wales, the king's serjeants, the secretaries of state, clerk of the privy-seal, clerk of the wardrobe, and such other persons as the king was pleased to advise with (*a*). In both these councils the king sat as judge, and causes heard there were said to be *coram rege in concilio*.

The nature and constitution of the former of these two councils is less known to us than that of the latter; but it may be discerned, that both of them kept up a very close correspondence with the parliament; so that causes were adjourned from thence into either of the councils, and were there heard and finally determined. Instances of such adjournments into the inferior of these councils were very

(*a*). Vid. st. 14 Ed. III. st. 1. c. 5.

common, on account of its being almost always in readiness to be called together, the king being seldom without some of the persons constituting this council about him: such references are to be found almost in every page of the parliamentary rolls. But adjournments into the *great council* were not so common, as it was seldom called; and when it did sit, it was generally after the dismissal of the commons, to make ordinances, or determine matters that were agitated and remained unfinished in the last parliament. The impeachment before-mentioned which the commons preferred against Sir *John Lee* in the 42d year of the king, was finally determined by the *great council* (a): and probably many other matters which appear by the rolls to have been determined by *the council*, might have been heard by the *great council*; but owing to the appellation being equivocal, it is not now easy to distinguish the one from the other. The method of address to the two councils was, like that to the parliament, by petition; and the objects of jurisdiction there were such questions, whether civil or criminal, for which the law had not sufficiently, or not at all, provided. The king's council used to sit in different *chambers* that were about the palace; sometimes *en la chambre de peincte*; sometimes *en la chambre blanche*, or *en la chambre de marcolf*; and, as some say (b), *en la chambre des etoiles*; to which place of their sitting the general return of certain writs in this reign, *coram nobis in camera*, referred (c): it very often sat in the *chauncery*.

Having premised these observations upon the state of the judicature in parliament and the council, the alterations made in both by some statutes passed in this reign will be better understood. There was only one statute that at all affected the judicature of the parliament. This was stat. 14 Ed. III. st. 1. c. 5. which was intended, partly, to relieve that assembly from the burthen of answer-

(a) Parl. Rot. 27. (b) 4 Inst. ch. 5. (c) Vid. Parl. Rot. passim.

ing all applications from the courts below, and partly, by establishing a sort of perpetual committee of parliament for that purpose, to render the course of obtaining advice and direction in judicial matters more regular and easy. The statute complains, that many mischiefs happened through delays of judgment, as well in the chancery as in the king's bench, common bench, exchequer, before justices assigned, and other justices appointed to hear and determine ; which delays were occasioned by the difference of opinions among the judges, and by other causes. To remedy this in future, it was ordained, that henceforth there should, at every parliament, be chosen a prelate, two earls, and two barons, who should have commission and power from the king to hear, by petition delivered to them, all complaints of delays or grievances done to them. Such lords were to have power to cause to come before them at Westminster, or elsewhere, the tenor of records and processes of such judgments so delayed, and to cause the justices who were then present to come before them to hear the cause and reasons of such delays : which cause and reasons being so heard, they, by advice of themselves, and that of the chancellor, treasurer, the justices of the one bench and of the other, and others of the king's council, as many and such as they should think convenient, were to proceed *to take a good accord, and make a good judgment* ; and according to such accord so taken, the tenor of the record, together with the judgment so accorded, were to be remanded before the justices where the plea depended, for them to give judgment immediately according to the record. However, if the difficulty seemed so great that it could not well be determined without assent of parliament, it was enacted, that the said tenors should be brought by the said chosen lords to the next parliament, and there a final accord and judgment should be given, according to which the judges should be commanded to proceed to give judgment. To

put this act into immediate execution, a commission of this sort was immediately issued to the archbishop of Canterbury and four lords.

Thus was a subsisting council of resort provided during the intervals of parliament; but the supreme court of parliament, which had distrusted the judges, would not confide their whole authority even to this delegation out of their own body, but by the express provision of this statute reserved to themselves the final decision in all points of difficulty and doubt. It appears, even after this act was passed, that the judges did not cease to recur to the parliament for advice immediately (*a*); and as there are through all the rolls many instances of such petitions to the parliament, it may be doubted whether this statute and the establishment thereby appointed were much attended to.

While the intercourse between the courts of ordinary justice and the house of lords was endeavoured to be checked by the former statute, the supreme judicature exercised by the council, in matters both civil and criminal, was put under some restraint by several statutes. These restraints were at that time considered as in support of the Great Charter of Liberties, which had forbid all imprisonment or disseisin of freehold but by the judgment of a man's peers, or the law of the land: the process and proceeding before the council were looked upon as derogatory to this great standard of common justice, and therefore not to be tolerated.

The jealousy entertained of the power of the council was justified by the present state of our judicial polity, compared with what it had been in times less settled and polished. The judicature of the king in council had been admitted for wise reasons originally, though as wise ones might now be urged for its abrogation. It was principally

(*a*) Vid. ant. 411.

calculated for times of disorder, when the common course of justice was circumscribed to very narrow bounds, and ordinary judges were unable to enforce the execution of the law against powerful subjects. When the state of society was altered, and things grew more settled, such supreme powers seemed no longer necessary. Again, the common law during this and the preceding reigns had arrived to such a degree of perfection, that arguments from the incompetency or defect of ordinary provisions were now of no avail: the remedies of the law were so increased in number, and their execution so effectually secured, that it was no longer requisite to recur to the judicial character of the king, to supply by his prerogative the insufficiency of law. All injuries now found redress in the courts below; and to recur to any other jurisdiction was thought unnecessary, dangerous, and burthensome to the subject.

Such arguments of convenience and propriety co-operating with the dread impressed by an authority that was as much or more perhaps of a political than judicial nature, contributed to raise a clamour against the council, and occasioned several acts of parliament, which had the effect of discountenancing any unnecessary application to the king in council, and allowed it only on such terms as, it was thought, might prevent an abuse of it. We shall consider these parliamentary regulations in the order in which they were passed.

The first statute on this subject was made in the 25th of Ed. III (*a*). which enacts, that, according to the Great Charter, none should thenceforth be taken by *petition* or *suggestion* made to the king or his council, unless it was by indictment or presentment of good and lawful people of the same neighbourhood where the fact was done, in due manner, or by process of writ original at the common law. Thus far of criminal inquiries. Further, as to civil mat-

(*a*) Stat. 5. c. 4.

ters, it enacts, that none should be ousted of his franchise or his freehold, unless he were duly brought in to answer, and was forejudged of the same *by the course of the law*; and if any thing was done otherwise, that it should be redressed, and held void. It was thought not sufficient to declare such proceedings to be void; but, suggestions to the king being often false or malicious, it was enacted, by stat. 37 Ed. III. c. 18. that, to prevent such for the future, all persons making suggestions should be sent with them before the chancellor, treasurer, and the council, there to find surety for prosecuting their suggestions; and if the suggestions were *found evil*, that the party should incur the same penalty as the adversary would if convicted, and then the matter should be left to the process of the law. This latter clause was repealed in the next year, and instead thereof it was ordained (a), that a person failing in proof of his suggestion, according to the former statute, should be commanded to prison, till he had agreed with the defendant for the damage and slander he had sustained, and besides, made ransom and fine to the king.

Either the evil was not abated by these statutes, or the uneasiness of the people required further declarations of the parliament on this subject. We find, about four years after this, an act which seems to give a finishing blow to all extraordinary judicature whatsoever, whether civil or criminal. The commons having again complained that persons were brought before the king's council by writ, *and otherwise upon grievous pain* (b), against the law, it was enacted, by stat. 42 Ed. III. c. 3. that no man be put to answer before justices without presentment or matter of record, or by due process and writ original, according to the old law of the land; and that anything done to the contrary should be void. Some plausible exceptions, no

(a) Stat. 38 Ed. III. st. 1. c. 9.

(b) *Sur greve peine.*

doubt, were devised to prevent the full operation of this statute, as the council still continued in the exercise of its judicial authority, both civil and criminal.

Thus much has been said of the supreme courts held *coram rege* in parliament and in council. We now proceed to the inferior courts. If these were taken in the order to which they seem intitled by the dignity of their style, we should first speak of the two courts *coram rege*; that *ubicunque fuerit in Angliâ*, and that *in cancellariâ*. But we shall first speak of the court of the steward and marshal; a tribunal, as we have seen, once of great eminence, but now sinking both in jurisdiction and importance, owing to the increasing authority of the king's bench, which derived perhaps some of its cognizance from this court.

The court of the steward and marshal. It was enacted, by stat. 5 Ed. III. c. 2. that inquests before the steward and marshal of the king's house should be taken by men of the country thereabouts, and not by men of the king's house, except in cases of contracts, covenants, or trespasses made by men of the king's house of the one part and of the other, and within the household, according to the statute made in the time of Edward I (a). It was ordained, that if any one would complain of error in this court, he should have a writ to remove the record and process before the king in his place, that is, in the king's bench: so that the king's bench was confirmed in that appellate jurisdiction, which the court of the steward and marshal possessed once over the other courts. This act was confirmed, or rather re-enacted, in ch. 2. and 3. of stat. 10 Ed. III.

The re-enacting the provisions of this act, and the petitions of the commons against this court during this reign, shew, that its jurisdiction created great jealousy and discontent. In the 25th year of the king, the commons

(a) Vid. ant. 235.

prayed, that none of the king's servants implead any one in the marshalsea; which was refused; as indeed it would have been confining this court wholly to those of the household(a). In the 50th year, it was prayed, that the steward and marshal should hold plea of nothing but what was contained in the statute of *articuli super chartas*; and that the limit of twelve miles might be reckoned either from the king's presence, or the place of the household, and not from both; and that the steward should keep his session within three miles of the king's presence. To this it was answered, that the twelve miles should be reckoned either from the king's presence, or from the household, and not from both(b). In the same year it was stated to the parliament by the commons, that there was great complaint of the marshal's court throughout the realm; in answer to which the parliament desired that the grievances might be specified(c). In the following year it was prayed, that the marshal might not intermeddle in that part of Southwark which was called guildable(d); and again, that it might be declared by statute what pleas the marshal should hold, and that prescription might be allowed before him, as well as before other justices of the king(e). But after all these complaints, this court was left to continue upon the ground of the above statutes and the old common law.

There appears nothing new respecting the court *coram rege ubicunque*, &c. commonly called the king's bench, unless the frequent mention of the *marshal*, as the officer and gaoler, may be considered as such. We find the marshals of the king's bench spoken of very familiarly at the beginning of this reign; especially in stat. 5 Ed. III. c. 8. relating to the bailing of felons: as this act states some things very particular, it may be well to give it at length. It begins with complaining, that per-

(a) Cot. Abri. 25 Ed. III. 34.

(b) Ibid. 50. Ed. III. 82.

(c) Ibid. 153.

(d) Ibid. 31.

(e) Ibid. 38.

sons indicted of felonies, robberies, and thefts, used to remove the indictment before the king, and there surrender themselves; upon which they would be let to bail by the marshal of the king's bench, as were also persons appealed, against whom an exigent had been awarded. As this was letting dangerous offenders loose upon the country, it was necessary some restraint should be put on the marshal's power of bailing: it was therefore enacted, that such persons should be kept in prison; and if any marshal was complained of within term for doing otherwise, that the justices should do what was right. At the end of every term the marshals were to chuse before the justices, previous to their departure from the place (supposing, as was sometimes the fact, that the king's bench sat in many different parts of the kingdom in different terms) in what town they would keep their prisoners; and there they were to hire houses at their own costs for keeping of such prisoners, and were not to suffer them to wander abroad neither with bail nor without; and if any were found wandering, the marshal was to be imprisoned for half a year, and ransomed at the king's will. After the statute had made this provision for the marshals of the king's bench, who it should seem were deputies intrusted on occasion of removals of that court, it enacts, respecting *the marshal*, that it should be done within the *verge*, as reason should require. A distinction, and at the same time a sort of connexion is here marked between the marshal of the verge and the marshals of the king's bench, which seems to justify a conjecture that this officer was adopted from the court of the steward and the marshal. In the 22d year of the king, the commons wanted to carry this law against the marshals still further; for they prayed, that if they let any body at large, who was committed for the peace, they might answer in damages; but this was refused(*a*).

(*a*) Cott. Abri. 22 Ed. III. 20.

When *Magna Charta* declared that common pleas should be held in a certain place, it seems to have been understood as of a certain *court* for such pleas, and not of a *certainty of place* where that court should be held; for we find the common bench had been removed like the king's bench, though perhaps not so frequently, as it did not in its stile import to be attendant on the person of the king. To prevent the expence and mischief which happened to suitors by such removals, it was ordained by stat. 2 Ed. III. c. 11. that before such removal the justices should be warned thereof, in order that they might duly adjourn the parties, and so prevent the losing of their process.

The court of exchequer underwent some parliamentary regulations. The exchequer was a depository of records; and therefore by stat. 9 Ed. III. st. 1. c. 5. it was ordained, that justices of assise, gaol-delivery, and of *oyer and terminer*, should send all their records and processes determined and put in execution to the exchequer at Michaelmas every year; and that the treasurer and chamberlains should receive them under the seals of the justices, and keep them in the treasury, as had been usual heretofore: the justices, before making out the estreats, were to send to the exchequer as formerly.

The course of appeal from judgments in the exchequer was, after several petitions to parliament, at length settled by statute. In the 21st year of the king, the commons petitioned that judgments given in that court might be redressed and reversed, if erroneous, in the king's bench, the same as error in the common pleas, and not before themselves, who gave the judgment, as it should seem the course then was. To this it was answered, that such error should be amended by the chancellor, treasurer, and two justices (a). But it was afterwards, somewhat differently, declared by stat. 31 Ed. III. st. 1. c. 12. that where a man complained of error made in process

Error in the
exchequer.

(a) Cott. Abri. 21 Ed. III. 26.

in the exchequer, the chancellor and treasurer should cause to come before them in any chamber of council (a) near the exchequer, the record of the process out of the exchequer, taking to them the justices, and such other sage persons as should seem proper; and should cause to be called before them the barons of the exchequer, to hear their informations and the causes of their judgment, and thereupon duly examine the business; and if any error was found, should correct and amend the roll, and afterwards send them into the exchequer for execution to be done thereof.

These are all the provisions made by parliament for the better ordering of business in the court of exchequer. But the commons had frequently petitioned for other alterations in the practice of this court, which, though they were unsuccessful in obtaining, may be worthy of notice, as they exhibit something of the usage of the court, and the opinion then entertained upon that subject. In the 22d year, the commons prayed, that an accomptant in the exchequer might not be run to issues before he had been warned to appear. To this it was answered, that the process should be first a *venire facias*, and then a *distringas* (b). Towards the close of this reign they prayed, that a man might have the privilege of waging his law in the exchequer, as in other courts; but this being excluded in that court by the king's prerogative, who was either plaintiff, or interested in all suits there, was not granted (c). In like manner, when it was prayed that attaints might be had of verdicts in the exchequer, as in other courts, it was refused (d).

We find it had become a practice to sue in the exchequer upon *suggestions*, in the way which had been so often complained of before, respecting the council. The whole proceeding by suggestion being a prerogative course might,

(a) *En auscune chambre du conseile.*

(b) Cott. Abri. 22 Ed. III. 17.

(c) Ibid. 50 Ed. III. 83..

(d) Ibid. 29 Ed. III. 27.

upon that idea, have obtained in the exchequer, which was a court for ordering and governing the king's revenue, and therefore, of all others, best intitled to the same extraordinary and summary way that was affected by the council. In the 40th year of this king we find a case which somewhat explains what this course was. It was said by *Lud*, a baron in the exchequer, that though no process was made against the king's debtor, yet if he was found present in the exchequer, he should be bound to answer to the king. To this another, named *Fitz-John*, said, that so it would be, provided it appeared of record that he really was a debtor; but not, if it only appeared by *surmise or suggestion made*, for *then* he ought to be brought in by process, &c (a). This was putting it upon the footing of the other courts; and accordingly, in the 47th year, the commons prayed that some remedy should be had where persons were called into the exchequer upon suggestion *without* process, contrary to the statute made in the 42d year of the king (b) before mentioned. The answer to this was, that if any special complaint was made, remedy might be had (c); so that these suggestions in the exchequer (which were in fact no other than petitions, or *bills*, as since called) were left upon the ground of stat. 42 Ed. III.

Equal pains were taken to improve other parts of our judicial establishment. The commissions ^{Justices of assise, and nisi prius, &c.} of assise and *nisi prius*, of *oyer and terminer*, and of gaol-delivery, received several modifications. It was complained that felonies had been very much encouraged, not only by too easy pardons, but also through an inattention to a statute made in the time of Edward I (d). which directed, that the justices assigned to take assises, if laymen, should make deliverance of the gaol; and if the one was a clerk, and the other a layman, then that the lay-judge, together with another of the

(a) 40 Ass. 35 pl. (b) Vid. ant. 419. (c) Cott. Abri. 47 Ed. III. 34.

(d) Viz. Stat. 27 Ed. I. st. 1. c. 3. Vid. ant. 173, 174.

country associated with him, should deliver the gaol. It was therefore enacted by stat. 2 Ed. III. c. 2. that justices should be appointed, as directed by that act; and that assises, attainments, and certificates, should be taken before the justices commonly assigned, being good men and lawful, and having knowledge of the law, as directed by another statute of Edward I. In addition to this it was now further provided, that writs of *oyer and terminer* should not be granted but before justices of the one bench or the other, or the justices errant; and that only *for great hurt and horrible trespass*, and of the king's special grace, as ordained almost in the same words by the statute of Westm. 2d (a).

The next provision relates to the commission of *nisi prius*. The last alteration made in this commission was by the statute of *York*, in the preceding reign (b), which confined it to cases, "*if the DEMANDANT pray the same.*" It was now enacted (c), that all such inquests to be taken in a plea of land should be taken as well at the suit of the tenant as of the demandant, with a saving of all other process, as appointed by the said statute of *York*. By stat. 4 Ed. III. c. 2. it was ordained, respecting three of these commissions, that good and discreet persons, other than of the places, if they could be found sufficient, should be assigned in all the counties in England to take assises, juries, and certifications, and to deliver gaols; and that was to be three times a-year, and more often, if need were.

The commission of *nisi prius* was further materially altered by two statutes, which at length put it into the form into which it has continued ever since: these are stat. 14 Ed. III. c. 16. and stat. 20 Ed. III. c. 6. We have seen, that by the original establishment of these justices (d), inquests and juries upon issues arising in the court of king's bench or common pleas, were to be taken before one or more

(a) Viz. ch. 29. Vid. ant. 170. (b) Vid. ant. 300. (c) Stat. 2 Ed. III. ch. 16. (d) 13 Ed. I. Westm. 2. c. 30. 12 Ed. II. st. 1. c. 3, 4. Vid. ant. 170. 301.

justices of the same place; but it often happened, that in many counties no justice of that description came, which brought great inconvenience on suitors and on the jurors impannelled. To remedy this, it was ordained, by stat. 14 Ed. III. c. 16. that, in the king's bench, a *nisi prius* should be granted before any justice of the court, if any of them went into that part; if not, then before any justice of the common pleas, at a certain day to be agreed; and a tenor of the record was to be delivered or sent to him, under the seal of the chief justice of the place; at which day he was to take the inquest, and return the verdict under his seal, with the writ, the tenor, and the pannel. These were to be received in the king's bench and enrolled, and thereupon judgment given according to the verdict. Such justice of the common pleas was to have power to record defaults and nonsuits, the same as if the *nisi prius* had been granted before some justice of the king's bench; after which defaults so recorded and returned, the justices were to give judgment upon the record. Thus far respecting issues depending in the king's bench: the like course was to be pursued in regard to issues in the common pleas. Further, it was provided, that should no justices of either bench come into the country where inquests or juries were to be taken, then the *nisi prius* should be granted before the chief baron of the exchequer, *if he be a man of the law* (which, it seems, at this time he sometimes was not) with the same powers as were given to the justices of the one bench or the other. If neither any justice nor the chief baron came into the country, then the *nisi prius* was to be granted before the justices assigned to take assises in those parts, so that one of the justices assigned was a justice of the one bench or the other, or the king's serjeant sworn; with the same authority as was above given to the justices of the one bench or the other. It was also directed, that should one party demand the tenor of the record, to deliver to the justices before whom

the *nisi prius* was granted, in order to prevent any fraud or damage being done to the other party, or the inquest, another tenor of the record should be given to the other party, if he required it. As the justices of *nisi prius* were authorized by the statute of York to give judgment in the country upon verdicts of assise and of inquests, and upon nonsuits and defaults, it was ordained, that the justices appointed by this act should have the same authority.

In the 20th year of this (a) king, it was ordained, that justices of assise should have commissions authorizing them to enquire in their sessions of sheriffs, escheators, bailiffs of franchises, and their under-ministers; and also of maintainers, common embraceors, and jurors in the country, if the said officers took any thing for the execution of their office, as for making pannels, or putting in jurors suspected and of evil fame; and if the said maintainers, embraceors, or jurors took reward of the parties to prevent the course of justice. This proceeding was to be as well at the suit of the king as that of the parties; and therefore, says the statute, the king has commanded the chancellor and treasurer to hear the complaints of all persons so aggrieved, and to ordain speedy remedy.

The other material alteration in the proceeding at *nisi prius* was effected by stat. 42 Ed. III. c. 11. It was complained that the pannels of inquests were not returned before the sessions of the justices at *nisi prius*, and otherwise; so that the parties could not have knowledge of the names of the persons to pass on the inquest, whereby, says the statute, divers of the people have been disinherited and oppressed. To remedy this it was now enacted, that no inquests, but assises and deliverances of gaols, should be taken by writ of *nisi prius*, nor in other manner, at the suit of any one, before the names of all those who were to pass in the inquest were returned into court. Thus far of *nisi prius*. As to assises, it was directed, that

sheriffs should array the pannels in assises, four days at least before the sessions of the justices, under the penalty of 20l. so that the parties might have a view of the pannel, if they required it. It was further directed, in order to facilitate the above regulation, that bailiffs of franchises should, under the like pain, make their return to the sheriff six days before the sessions.

These two acts of the 14 and 42 Ed. III. deserve a particular notice. It is probable, that before the 14 Ed. III. there used to be no record made out for the trial at *nisi prius*; which being before a justice of the court where the issue was joined, there was less need of any copy of it to inform the judge; and the authority to try the issue rested wholly on the judge's commission of *nisi prius*. Whether before this act there might not be sometimes such a copy made, can only be collected from probable conjecture; but after this act, it became both expedient and requisite that a tenor of the record should be made, which has since been called the *Nisi Prius* Record: upon which the judge "returned the verdict," as the act says, making what has been since called the *Postea*, from the initial word in the form of the return.

The alteration effected by stat. 42 Ed. III. was this. We have seen that heretofore certain writs used to be made returnable before the justices itinerant, sometimes with a clause of *nisi prius*, sometimes without (*a*). It is probable this practice was not yet wholly out of use, and that this statute alludes to it, when it speaks of "writs returned at the sessions of the justices at *nisi prius* and otherwise." We have also seen (*b*) that this clause of *nisi prius* was inserted not only in the writ of *venire facias*, as directed by the statute of *nisi prius*, but also in the writs of *habeas corpora juratorum* and *distringas*, when the jurors were brought in by either of those writs, after their default on the

(*a*) Vid. ant. vol. I. 382.

(*b*) Ibid. 415.

venire facias. The practice had continued, as formerly, irregular and unsettled; but when this act directed that no inquest should be taken by "*nisi prius*, or other manner," before the names of the jurors were returned into court, it is probable that, in order to attain this object, the jury-process begun then first to be arranged in this way: The *venire facias*, instead of containing the clause of *nisi prius*, was made returnable on some day in term, with the pannel annexed; then, after the parties had had the opportunity of making their challenges, as designed by this statute, the process of *distringas* or *habeas corpora* would issue, with a clause of *nisi prius* in it, returnable the following term; and upon this writ the trial was had. Thus, ever after, it was necessary in all causes that went to trial, to have both a *venire* and a process of contempt, either a *distringas*, or a *habeas corpora* against the jurors.

Some few regulations were made respecting justices of *oyer and terminer*, independent of the other commissions, and which, for this reason, we have reserved to be mentioned last. In the statute of Northampton, stat. 2 Ed. III. c. 6. which contains many provisions for the better keeping of the peace, and punishment of offenders, it was ordained by chap. 6. that whereas by the statute of Winchester the justices assigned had power to enquire of defaults in the execution of that statute, and make a report thereof to the king in parliament, to be remedied by the king, which course did not seem effectual; it was now enacted, that the said justices should have power to punish all disobedient persons. This was in the early part of the reign, before the *keepers*, or, as they were afterwards called, *justices of the peace* were commissioned with such high powers as they afterwards received.

By another chapter (a) of the same statute there is a special authority given to justices of *oyer and terminer*,

(a) Ch. 7.

which seems to be a confirmation of the court of *trailbaston* instituted by Edward I. For the punishment of felonies, robberies, manslaughter, trespasses, and oppressions of the people, it was enacted, that the king should assign justices in divers places, within the king's bench and elsewhere, as was done in the time of Edward I. of great men of the land, being of great power, with some justices of one bench or the other, with other learned men in the law, to inquire, as well at the suit of the party as at the king's suit, and *to hear and determine* all manner of felonies, robberies, manslaughter, thefts, oppressions, conspiracies, and grievances done to the people against the law, statutes, and customs of the realm, as well within franchise as without; and also to enquire of the sheriffs, coroners, under-sheriffs, hundredors, bailiffs, constables, and all other ministers, within liberties, and without. We shall see afterwards, that the authority of justices of the peace was thought more conducive to such end than this commission of *trailbaston*, and that the latter was gradually superseded thereby. In the 34th year of this king (a) it was ordained, that the justices assigned in writs of *oyer and terminer* should be named by the court, and not by the party, as we have seen might be, and was usually the course (b).

Thus stood the commissions of assise and *nisi prius*, of *oyer and terminer* and gaol-delivery, at the close of this reign. Though attempts had been made to expedite causes when they had come to that stage in which a *nisi prius* should issue, it was prayed by the commons, in the 50th year of the king, that the process of such as were at issue, and did not within one year after sue out their *nisi prius*, should be discontinued, and held void: again, if the plaintiff or defendant did not, upon the return of the *habeas corpora*, sue out his *nisi prius*, that the whole process

(a) Ch. 1.

(b) Vid. ant. 170.

might be discontinued: and further, that every man might have his *nisi prius* granted, as well against the king as others, without suing to the privy-seal: but neither of these applications succeeded (*a*); any more than a petition that such as sued forth assises should not be obliged to pay for the justices patent, as had always been the usage (*b*).

A statute was made in the 20th year of the king, which had a reference to all the courts we have been mentioning, and was founded in a zeal for the due administration of justice to all the king's subjects. This statute opens by stating, that the king *had* commanded his justices to do equal law and execution of right to all his subjects, whether rich or poor, without any regard to persons, and without delaying to do right on account of any letters or commandment from the king, or any other; and it enacts, that should any letters, writs, or commandments come to the justices, or to others deputed to do law and right, according to the usage of the realm, in disturbance of the law, or execution thereof; the justices, and others deputed, should proceed to hold their courts and processes, as if no such interference had been made. It recites, that the king had caused all his justices to be sworn, to take no fee nor robe (that being the denomination under which part of their salary was paid) of any one, but the king only, during their office; and to take no gift nor reward, by themselves or by others to their use, of any one who had any matter depending before them, except meat and drink, and that of small value; and further, to give no counsel to any, where the king was party, or was interested, under pain of their body, lands, and goods. At the same time an increase was made in the judges fees (*c*). The same was ordained respecting the barons of the exchequer; and they were expressly commanded, in the king's presence, to do

(*a*) Cott. Abri. 50 Ed. III. 146. 174.

(*b*) Ibid. 45 Ed. III. 35.

(*c*) Ch. 1.

right and reason to all the king's subjects, without the delays that had been so much complained of in that court (a). It was also ordained, that justices assigned to hear and determine, and those who were associated to them, justices of assise to be taken in the country, and of gaol delivery, and those associated to them, should take such an oath as should be enjoined them by the council in the chancery, before their commissions were delivered to them (b).

The impediment thrown in the way of judicial proceedings by protections, was a great grievance to the nation; and, notwithstanding the fair appearance of the king's intention, as expressed in the above statute, these protections were granted all through this and the subsequent reigns, and the commons frequently, though in vain, petitioned against them. From a perusal of stat. 25 Ed. III. st. 5. c. 19. we find the king had granted protections to several persons, being his debtors, discharging them from any other actions of debt till they had satisfied the king. It was provided nevertheless, by that act, that such persons should answer suits against them, but that execution of the judgment should be suspended till the king was paid; though such plaintiffs, if they would undertake for the king's debt, might have immediate execution against the defendant. Very early in this reign it was enacted (c), that no command either under the great or little seal should issue to disturb or delay common right; and if any such command was to come, the justices were to disregard it. As there was still complaint of fines being exacted for *beaupleader*, the statute of Marlbridge was again (d) directed to be observed (e).

After the several courts, the remedies of the law constitute the next objects of consideration. Nothing more was done by the parliament on this head than enlarging and

(a) Ch. 2. (b) Ch. 3. (c) Stat. 2 Ed. III. c. 8. (d) Vid. ant. 70. (e) Stat. 1 Ed. III. st. 2. c. 8.

modifying those already in use, making no addition to the old stock.

The writ of attaint, of which so much has already been said (*a*), was the only redress to which those could resort who had suffered by an unjust verdict: this was now rendered more general and more expeditious by some few regulations. It was ordained by stat. 1 Ed. III. st. 1. c. 6. that a writ of attaint should be granted, as well upon the *principal* as the damages in a writ of trespass, and that the chancellor should have power to grant such writs without speaking thereof to the king. Further it was enacted, that the justices should not omit taking the attaint, because the damages for which it went were not yet paid; which it seems was before held a good objection upon the trial, as the party plaintiff could not say he had been damnified till he had paid the damages given by the wrongful verdict. To avoid the great delays to which attaints as well as other suits were liable, but which were particularly grievous in an action that was made necessary by the misconduct of jurors, who had failed of doing their duty, it was enacted, by stat. 5 Ed. III. c. 6. that no essoin of the king's service nor protection should be allowed in such juries, any more than in assises of novel disseisin (*b*); that five days (*c*) in the year at least should be given before the justices of the common bench in such juries; and that there should be a *nisi prius* in this, as in other writs. Again, by the next chapter of the same act the provision of stat. 1 Ed. III. concerning attaints in trespass, was enlarged; for it was enacted, that attaints should be allowed as well in pleas of trespass moved *without* writ as by writ, before justices of record, if the damages adjudged were more than forty shillings. This was carried still further by stat. 28 Ed. III. c. 8.

(*a*) Vid. ant. 117.

(*b*) Vid. ant. 315.

(*c*) This must considerably shorten the returns prescribed by the stat. *Dies communes in banco*. Vid. ant. 57, 58.

which gives this writ as well upon a *bill* (which had lately become a common way of instituting suits) as a writ of trespass, without any regard to the quantity of damages.

In the mean time, the parliament had been solicited to make this remedy more general. In the 21st year there was a petition praying, that attaints should be granted in writs of debt, and in all other writs and bills where the demands or damages did not amount to forty shillings; and further, in actions where a person sued *tam pro domino rege, quàm pro seipso*, as the king's ministers and others frequently did, where, as the whole principal and damages recovered went to themselves and not to the king, it was thought hard that neither a writ of error nor attaint should be had. But though it was granted that writs of error should lie, this, as well as the former application about attaints, did not receive a favourable answer (a). The parliament, however, at length complied with the wishes of the people, and it was ordained by stat. 34 Ed. III. c. 7. that an attaint should be had by the person against whom a verdict passed, as well in pleas *real* as pleas *personal*; and that it should be granted to the poor, who would *affie* that they had nothing whereof to make fine, saving their countenance, without paying any, and to all others upon an easy, fine. After this, the proceeding by attaint grew more common, being open to all persons who were aggrieved by a false verdict.

It was complained, that executors could not by the old law have an action for a trespass done to their testator, as of goods and chattels carried away; to remedy which it was enacted by stat. 4 Ed. III. c. 7. that they should have actions in such cases, and recover damages, as their testators might. And further by stat. 25 Ed. III. st. 5. c. 5.

(a) Cott. Abri. 21 Ed. III. 23, 24.

it was ordained, that executors of executors should have actions of debt, accompt, and of goods carried away, of the first testator; and further, should have execution of statutes-merchant, and recognizances made in courts of record of the first testator, as he would have had, if alive. Such executors of executors were to answer to others for so much of the goods of the first testator as came to their hands, in the same manner as the first executors should have done, if alive.

We have before seen, that an *assisa utrùm*, or, as it had now long been called, a *juris utrùm*, would not lie for any other than a parson (a); but it was now ordained by stat. 14 Ed. III. st. 1. c. 17. that parsons, vicars, wardens of chapels, and provosts, wardens and priests of perpetual chauntries, should have writs of *juris utrùm* of lands and tenements, rents and possessions annexed to vicarages, chapels, and chauntries, and recover by other writs in their case, as parsons of churches or prebends. The writ of *deceit* was extended by stat. 2 Ed. III. c. 17. which enacted, that it should be maintainable as well in case of garnishment touching pleas of land, where such garnishment was given, as in case of summons in a plea of land.

Such were the alterations made in some old writs by parliament. The commons endeavoured to obtain a change of the law in two real writs, but were not successful. They complained, that where land was given to a man and his wife, and the heirs of their body begotten, though they had no issue between them, yet if one died, the other, as the law then stood, might commit waste, not being within any of the laws of Edward I. made against waste (b). This was thought a great hardship on the reversioner, as the estate of the first takers (though the survivor of them was called,

(a) Vid. ant. vol. I. 369.

(b) Vid. ant. 73.

tenant in tail, after possibility of issue extinct) could be considered as in effect only an estate for term of life; it was therefore prayed, that a writ of waste might lie in such case. Again, as a writ of possession would not, by the old law, lie of land devisable (*a*), although not actually devised, and this was felt to be a considerable impediment to justice, it was prayed that writs might be granted of such lands, saving to the tenants their plea in case of an actual devise. The answer to both these petitions seems to intimate that they should be ordained by statute (*b*); but no such statute appears to have been made.

The first statute of this king that relates to process and proceeding, is stat. 2 Ed. III. c. 13. which is principally worthy of observation, because it shews the opinion to have then been that the death of the king somewhat affected, if not destroyed, an action that was grounded on a fact against the king's peace; for this act declares, that like process should be made of trespass done in the time of Edward II. as of trespass done in the time of this king.

We have seen in Bracton's time, when the process of distress had taken the defendant's goods and chattels, in what manner he was satisfied out of them for his damages (*c*). Several rules were laid down by stat. 5 Ed. III. c. 12. and 13. for a similar redress in Process of outlawry. cases of outlawry in civil actions; that where the plaintiff recovered damages, and the defendant was outlawed at the king's suit, no charter of pardon of his outlawry should be granted, except the chancellor was certified that the plaintiff was satisfied for his damages. Where a man was outlawed by process before his appearance, no such charter was to be granted, except the chancellor was certified that the person outlawed had yielded himself to prison before the justices of the place from whence the writ of

(*a*) Vid. ant. vol. I. 363.

(*b*) Parl. Rot. 21 Ed. III. 46, 47.

(*c*) Vid. ant. vol. I. 484.

exigent issued; as before the king's bench, common pleas, or justices of oyer and terminer; but if the last were not sitting, then before the justices of the king's bench; and in such case the record also with the process was to be removed before that court. Upon the party surrendering, the justices were to warn the plaintiff to appear at a certain day; at which day, if the warning was duly witnessed, and the plaintiff appeared, then they were to plead upon the first original writ, as though no outlawry had been pronounced. If the plaintiff did not appear, the defendant was to be delivered according to his charter (a).

Again, because persons duly outlawed had avoided their outlawry by reason of imprisonment, which had been supported by the false testimony of sheriffs and others, it was enacted, that if any would defeat an outlawry by such testimony, he should surrender himself to prison, and then the justices of the king's bench should cause the party at whose suit the outlawry was pronounced, to be warned to appear before them at a certain day; at which day, if he would verify that the testimony was untrue, such verification should be received. In like manner the king's serjeant, or his attorney, or any other that would sue for the king, was to be received to have the same averment against such testimony, where the outlawry was pronounced at the king's suit (b).

It may be just mentioned here, though it more properly belongs to that division where we treat of the criminal law, that a declaration was made by stat. 18 Ed. III. st. 1. in what cases an exigent should issue; some small alteration in which was made by stat. 2. of the same year, c. 5. both which will be spoken of more particularly in their proper place. We next come to stat. 25 Ed. III. st. 5. c. 17. which gave a greater scope to the process of outlawry in

(a) Ch. 12.

(b) Ch. 13.

civil actions; for it enacts, that such process should be made in a writ of *debt*, and *detinue* of chattels, and in taking of beasts (a) by writ of *capias* and process of exigent, as was used in a writ of *accompt*.

This statute, and those relating to the writ of *accompt*, and here alluded to, have been long considered as introducing a novelty into the process of personal actions. It is laid down by lord Coke, and has been repeated by others without examination, that no writ of *capias* lay at common law for debt, or damages, but only in actions *vi et armis*. But this opinion is contradicted by the history we have before given of process. We find in the reign of Henry III. that the process in all personal actions was as follows: If the party did not appear upon the summons, then he was attached by pledges; and afterwards by better pledges: if he still did not appear, the sheriff was commanded *quòd habeat corpus*, to take the body: if the sheriff returned *non inventus*, there issued a *distringas per terras et catalla*; after that, another *distringas*, commanding him also to take the body; after that, another *distringas, ne manum apponat*; and lastly, a writ to take the land and chattels into the king's hands.

Thus there might be one summons, two attachments, a *capias* (as it was afterwards called), and four distresses. To this it is added by Bracton, that should the defendant not be found, nor have any lands or goods, whether the action was for money or for a trespass, he was to be demanded from county to county, and outlawed (b); and persons so outlawed were condemned to perpetual imprisonment, or to abjure the realm.

Such was the process to compel appearance in court. It happens that no ancient author has furnished us with any information concerning the process of execution in per-

(a) *En prises des quers.*

(b) *Vid. ant. vol. I. 483, 484.*

sonal actions; but whether we consider the analogy of the two cases, or the rule that was afterwards laid down respecting the process before appearance and after judgment, we cannot avoid concluding, that there was, at least, as effectual a process upon the judgment, as upon the original writ.

This being the state of process at common law, we shall now consider the alterations that had been made by some late statutes. In the first place, it was enacted by the stat. Marl. c. 12. that in all cases of attachment, after the second attachment should immediately follow the last distress (a). By this provision, a very material alteration seems to have been made in all personal actions; for not only the three former *distringas*'s were now superseded, but also the writ of *habeas corpus*, which, at common law, followed immediately after the second attachment; and of course, as it should seem, the process of outlawry no longer could follow: for, according to Bracton, it was only where the defendant had no lands, *and could not be found*, that he was to be demanded and outlawed; and the return of *non inventus* could not be made but upon the *habeas corpus*, and the second *distringas*, both which were now taken away.

If this was the construction, at that time, put on this provision, the consequence seems to have been very early discovered; for in the same parliament, a provision was made respecting accountants, which restored the process against them very nearly to the same state in which it had been before the late act. It was ordained by stat. Marl. c. 23. that if bailiffs, who ought to account with their lords, withdrew themselves (that is, were *non inventi*), and had no lands or tenements by which they might be distrained, they should be attached by their bodies, so as

(a) Vid. ant. 75.

the sheriff might cause them to come to render an account (a). The process, framed upon this act, differed from the common law process in this respect only; instead of a writ to take the body before the *distringas*, it was not to issue till it appeared that the party had no lands or tenements; and accordingly a special writ, called a *monstravit de compoto*, was framed for that purpose.

The next regulation about personal process was by stat. Westm. 1. c. 45. which directed that the last distress should issue immediately after the first attachment (b). After this, we meet with the stat. Westm. 2. c. 11. which enacted, that when accountants were found in arrears by auditors, their bodies should be arrested, and sent to gaol till they satisfied all arrears; and further, that if they fled and would not come to accompt, and had nothing whereby they could be distrained, and were returned *non inventi*, they should be demanded from county to county, and outlawed (c).

Putting together all these statutes, the process seems to have been reduced to this form. In accompt it was summons, one attachment, one (being the last) distress, *capias*, and outlawry; and in all other personal actions, a summons, one attachment, and one (being the last) distress, and there it ended. The statute, therefore, of this king now in question had the effect, it is true, of giving to the action of debt a process against the person, which it then had not; but this appears to be only bringing it back to the condition it was in at common law, with the improvement of such changes as had been made by the before-mentioned statutes, to lessen the number of writs of attachment and of distress.

What has just been said of the process of *capias* and outlawry in personal action, must not be construed to extend to trespass, which was in the nature of a criminal

(a) Vid. ant. 73.

(b) Vid. ant. 124.

(c) Vid. ant. 179.

proceeding, and on that account intitled to the writ of *capias* and process of outlawry (a).

For the due execution of these and all writs in general, some alteration was made in the stat. Westm. 2. c. 39.

(a) The validity of these acts, and of the two relating to the process of *capias* in accompt, has been questioned in a very particular manner by Mr. Burgess, in his *Considerations on the Law of Insolvency*. He contends that, according to *Magna Charta*, no man should be imprisoned but by the verdict of his equals, or by the law of the land; that by the law of the land no man could be imprisoned for debt; that the statutes of Marlbridge and of Westminster 1. which authorized imprisonment of accountants, were repealed by such statutes as were made to confirm *Magna Charta*; so that the present statute of Edward III. referred to a nullity; that this statute also was repealed by subsequent confirmations of *Magna Charta*, and more especially by stat. 42 Ed. III. which expressly repealed all acts contrary to *Magna Charta*: that the stat. Hen. VII. which gave the same process in trespass on the case as was allowed in debt and accompt, referred to statutes that were not in existence, and was therefore void;—so that, upon the whole, this writer concludes, that there is no parliamentary provision whatever authorizing imprisonment for debt. This hypothesis, which has received all the advantage that could be derived from so ingenious a pen as that of the author, depends wholly on the force he attributes to the words *lex terræ*, in *Magna Charta*. It seems a very singular construction to confine their sense to what was the law of the land at the time of passing the Charter, as if the parliament was to be for ever tied up from making any future alteration. Besides, as it appears from Bracton, that process against the person was, in his time, the usual procedure in personal actions, it is very probable that such was the *lex terræ* at the time of passing *Magna Charta*. But this part of Bracton has not been at all attended to in considering the history of process in personal actions.

The obvious sense of *lex terræ* in this passage is, probably, the true one; namely, every lawful process and proceeding *. That an arrest by writ was no violation of *Magna Charta* is confirmed by a statute of the present king, which was made for explaining and enforcing this very provision. The statute 25 Ed. III. st. 5. c. 4. runs in these words: *Whereas it is contained in the Great Charter of the franchises of England, that none shall be imprisoned, nor put out of his freehold, nor of his franchises, nor free customs, unless it be BY THE LAW OF THE LAND*, it is accorded, assented, and established, that from henceforth none shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law.

* Vid. ant. vol. I. 249.

For whereas that directs writs to be delivered to the sheriff in the *full* or *rear county*, and that in such case the sheriff should thereupon make a bill; it was now enacted by stat. 2 Ed. III. c. 5. that at whatsoever time or place in the county a man delivered a writ to the sheriff, or under-sheriff, they should receive the same, and make a bill according to the above statute, without taking any thing for so doing; and if they refused, others who were present might set their seals to it; and the sheriff or under sheriff should be liable to the penalties of the above statute, if they failed in returning the writ. Power was given to the justices of assise to hear all complaints on this subject, and award damages to the aggrieved party. It had been enacted by stat. 1 Ed. III. st. 1. c. 5. that a man might aver against the false returns of bailiffs of franchises, who had full returns of writs, and recover as well against them as against the sheriff, where too small issues were returned, and in other cases, so that it was not to the prejudice of the lords and their franchise, or that of holy church, and that the punishment fell wholly on the bailiffs. So many expedients were tried to secure the regular execution of process.

Some of the rigorous consequences of the ancient process were removed. We have seen, that a tenant whose land was taken by the *magnum cape*, lost it if he did not replevy in a certain space of time (a). By stat. 9 Ed. III. st. 1. c. 2. this old law of *non plevin* was taken away; for it was enacted, that none should lose his land by reason of *non plevin*. By chap. 3. of the same act, the *fourcher* by essoin was taken from executors, as it had been from other co-defendants by some statutes of Edward I (b). It was ordained, that in a writ of debt brought against divers executors, neither they, nor any of them, should have more than one essoin before appearance, that is, at the summons or attachment; and after appearance but one, as the testator should have had; so that the executors were to be

(a) Vid. ant. vol. I. 419. 114.

(b) Vid. ant. 122. 150.

considered only as one man representing the testator. Further, by the same act, a course of process against executors was thus directed; namely, that though the sheriff answered at the summons that some of them had nothing whereby he might be summoned, yet an attachment should still be awarded against them. And if the sheriff answered, that he had nothing whereby he might be attached, the great distress should be awarded; so that at the return thereof, he or they who first appeared in court should answer to the plaintiff: and though some of them had appeared in court, and made default at the day on which the great distress was returned upon the other, yet still he or they who first appeared at the great distress should be put to answer. In case the judgment passed for the plaintiff, he should have his judgment and execution of the goods of the testator, against those who pleaded, *and* against all others named in the writ, as well as if they had all pleaded. The statute, however, contains a saving for those who chose to proceed after the old course at common-law.

As the law now stood, a demandant in a plea of land was often delayed by the tenant vouching to warranty a dead man, against which voucher the demandant was not received to aver that he was dead; but it was now enacted, by stat. 14 Ed. III. st. 1. c. 18. that such averments should be received. Again, as by the old law (a) a question upon a *false judgment* from an inferior court was to have been tried by duel, it was enacted by stat. 1 Ed. III. st. 1. c. 4. to correct so barbarous a proceeding, that when a record came into the king's court by writ of false judgment, if the party suggested that the record was otherwise than the court alleged it to be, the averment should be received *of the good country* (b), *and of those who were present at the court when the record was made*, if they were returned by the sheriff with the others of the country; and if they came not, the inquest was to be taken by the good country.

(a) Vid. ant. vol. I. 153.

(b) *Soit receu averrement de bone pais.*

Two other laws were made respecting trials; the one for the trial of deeds, the other of bastardy. It was complained, that great delay happened in actions by the parties pleading in bar a release, quit-claim, or other special deed made within a franchise where the king's writ did not run. To remedy this obstruction to justice, it was enacted, by stat. 9 Ed. III. st. 1. c. 4. that when such deeds were exhibited in bar of an action, bearing date in a place within a franchise, although there were witnesses of the same franchise named in the deed, yet if the deed was denied, process should be awarded into the county where the plea was moved, to have the inquest of the country *and* the witnesses to appear: and if the witnesses came not at the great distress, the justices were not on that account to omit proceeding to take the inquest, but were to go on in like manner as if the deed had been made in the county; a course similar to one directed in a similar case in this reign, and which must gradually lead to the practice of no longer summoning the witnesses to be joined with the jurors. In stat. 25 Ed. III. st. 2. which communicated to children born of English subjects in foreign parts the privileges of natural-born subjects, it was ordained, that in questions of bastardy arising upon that act, the matter should be certified by the bishop of the place where the demand was, the same as where bastardy was alleged against persons born in England.

Some matters of pleading were altered by stat. 25 Ed. III. st. 5. c. 11. The exception of non-tenure of parcel was not to abate any writ, but only for that quantity concerning which the non-tenure was alleged (*a*). Again, by ch. 18. of the same statute, it was ordained, that notwithstanding adjournment made in the eyre by writ *de libertate probandâ*, purchased by villeins to delay their lords of their actions against such villeins, the same lords should be received to

(a) Vid. ant. vol. I. 475, 476.

allege the exception of villenage against their villeins in all writs, whether such writs *de libertate probandâ* were purchased by deceit, or in other manner; and that the lords might seize the bodies of their villeins, as they might before the writ *de libertate probandâ* was purchased. But a more effectual check was given to pleas of villenage (which were very common at this time) by stat. 37 Ed. III. c. 17. ordaining, that no writ should be abated by the exception of villenage, if the demandant or plaintiff would aver that he who alleged the exception was free the day of the writ purchased.

Qualifications
of jurors.

Nothing could be of more importance than that trials by jury should be conducted with impartiality, and free from all external influence; but, considering the persons who constituted this tribunal, it was found very difficult to keep it clear of imputation. Of what sort the imperfections of this mode of trial were, will best appear by the statutes made in this reign to correct them. By stat. 5 Ed. III. c. 10. it was ordained, that if any juror in assises, juries, or inquests, took of the one party or the other, and was thereof duly attainted, he should not in future be put on assises, juries, or inquests, and besides, should be imprisoned and ransomed at the king's will; which offence was to be enquired of by the justices before whom such assises, juries, or inquests, were had. Again, in the 34th year, (because sheriffs arrayed their pannels of people procured, to effect which they would take persons living at any distance from the county, who had no knowledge of the fact upon which the inquest was to pass) it was enacted, by ch. 4. of that statute, that pannels should be made of *the next people* (a), who were not suspected or procured; and if the sheriff acted otherwise, he was to be punished by the justice in proportion to the offence against the king, and the damage sustained by the party. Again,

(a) *De plus prochains gentz.*

by ch. 8. of the same statute, either of the parties (or any stranger for the king) might have his plaint by bill against a juror who had taken any thing of him, or the other party, for the verdict; which bill was to be before the justices before whom the jury were sworn, and the juror was to be put to answer immediately; and if he pleaded to the country, the inquest was to be taken immediately. If the juror was fined at the suit of any but one of the parties, the person was to have half the fine, and the parties to the suit to recover their damages by assessment of the inquest; the juror was besides to suffer a year's imprisonment, which the statute declares should be redeemed by no fine: the party was also to be at liberty to sue by writ before other justices. In addition to the provisions of this act, it was further ordained by stat. 38 Ed. III. st. 1. c. 12. that such corrupt juror should forfeit ten times as much as he had taken, one half to him that would sue, the other to the king. All embraceors procuring such inquests were to be punished in the same manner; and if such embraceor or juror had not sufficient to pay the above penalty, he was to be imprisoned for a year. No justice or other minister was to enquire *ex officio* of such offences, but only at the suit of the party, or of some other. Such guards was it thought necessary to put upon this trial, though a favourite with the nation.

Besides these statutes, that are more properly confined to civil actions, there were some that made similar provisions respecting jurors in criminal matters, and in inquests before escheators, and others; all which will be considered in their proper places.

The right of waging his law was secured to a defendant in an instance where in the time of Edward I. he was by law entitled to it (a). It is said in stat. 38 Ed. III. st. 1. c. 5. that many people were grieved

Law wager.

(a) Vid. ant. 259, 260.

and attached by their bodies in the city of London, at the suit of citizens surmising that they were debtors, and could be proved so by their papers, though they had no deed or tally to produce: it was therefore enacted, that every man should be received *to his law* by people sufficient of his condition against such papers, and the creditor should not put the party to plead to the inquest unless he chose; but if he would wish to do so in future, he must take care to have some other security than mere papers. Thus the wager of law against mere papers (and *à fortiori* against verbal testimony) was secured to the citizens of London, as firmly as it was before practised in the common-law courts.

As to the end and object of suits, whether civil or criminal, it was ordained, by stat. 38 Ed. III. st. 1. c. 3. that all fines taken before justices should be in the presence of the pledges, and the pledges were to know the sum of the fine before they departed.

Statute of jeofail. We have before seen (a) how scrupulous and nice the old pleaders were in every point of the process and proceeding in an action, so as to cavil at mistakes in syllables and letters. As many of these mistakes were owing to the negligence of clerks, and they were never in themselves of such importance as to deserve all the attention that had been paid to them, it was thought prudent to remove some of those frivolous objections by a parliamentary declaration. It was accordingly enacted, by stat. 14 Ed. III. st. 1. c. 6. that by the misprision of a clerk, in any *place* (that is, *court*) whatsoever, by mistaking in writing one syllable or one letter, too much or too little, no process should be annulled or discontinued; but as soon as the thing was perceived, by challenge of the party or in other manner, it should be hastily amended in due form, without giving advantage to the party that challenged the same, on account of such mis-

(a) Vid. ant. vol. I. 333. 461. and ant. 98.

prison. This is the first of those provisions, which in latter times have been called *Statutes of JEOPAILLAGE and Amendment*.

Some farther regulation on this subject was made by stat. 36 Ed. III. st. 1. c. 15. which act is better known by the alteration it made in the language of courts, directing that all matters should be there debated in English, and not in French as heretofore. The statute sets forth as a reason why the laws were so ill obeyed, because "they were pleaded, shewed, and judged in the *French* tongue, which was much *unknown in the realm*; so that the people (says the act) which do implead, or be impleaded in the king's court, and in the courts of other, have no knowledge nor understanding of that which is said for them, or against them, by their serjeants or other pleaders:" for the better observance, therefore, of the law, it was enacted, that pleas pleaded in any courts whatsoever, whether in the king's or other courts, before the king's justices or others, should be pleaded, shewed, defended, answered, debated, and judged in the *English* tongue, and should be entered and inrolled in *Latin*; which latter was no more than confirming the ancient practice; records of courts always having been in *Latin*.

Thus the language which the Conqueror had imposed upon our courts (the strongest badge of servitude, perhaps, that could be devised) was suffered no longer to maintain its ground. The victories of Edward having given the English a declared superiority over the descendants of their former masters, seemed to mark this as a proper time for such a revolution. Though the language of our courts, in all argument and decision, was henceforward to be English, the French still continued the *written* language of the law, being that in which it had used to lisp in its infancy, and to which in its maturer years it was still attached as a sort of mother-tongue. Thus, many apt and

significant terms and phrases were still retained in debate, and conversation upon topics of law; and the reports of what passed in court were still taken and published in French, and so continued for hundreds of years after. It was foreseen and intended by the makers of this act, that much of the old language should still remain; for after the above change is ordained, there are added the following reservations, namely, "that the laws and customs of the realm, *terms* and *processes* be holden and kept as before had been; and that by the ancient *terms* and *forms* of counting (a) no man should be prejudiced, so that the matter of the action be fully shewed in the declaration, and in the writ;" which only meant, that though such established and known forms of expression were not in English, yet it should be no breach of this statute.

Our criminal law received some improvement from statutes passed in this reign. The reducing the crime of treason to a certainty by a parliamentary definition, as it freed the subject from the entanglement of ambiguous and unknown law, and, consequently, from the arbitrary decisions of judges, very eminently distinguishes this period in the history of our penal law. The offence of treason in its original notion, as a crime against the state, lay open to a great latitude of construction: not only direct breaches of allegiance to the supreme power, but violating the persons who were nearly related to, or attendant on, the person of the supreme magistrate; disorders of a public nature tending to confusion and civil commotion; bold and riotous breaches of the peace; affectations of extraordinary influence and authority, with speeches of an ambitious import, had at divers times been brought within the bounds of this offence, as conducing in their consequences to subvert the established order of allegiance and subordination in government. This had been remarkable in the early times of our law; when it was left, in a great

(a) *Les anciens termes formes de counter.*

measure, to the breasts of judges to fix and determine by their judgment, in particular cases, what was treason, and what was not. Killing the king's father or brother, or even killing his messenger, had received the punishment of treason (a). In the present reign they had gone still further. In the 21st year of the king, a knight of Hertfordshire forcibly detained a man till he paid him 90l.: this was held treason, *because* he was in so doing guilty of *accroaching* (as they called it), or attempting to exercise royal power.

Perhaps one great motive to raising these constructive treasons, was the forfeiture which in such case belonged to the king. On the other hand, the loss thereby sustained by lords, who would be intitled to an escheat in case of felony, and who at any rate incurred a diminution of the casualties of tenure by such forfeiture, might be a spur to them to obtain some parliamentary definition of this crime. The whole kingdom were interested in a question that touched the lives of all. The determination above-mentioned created such an alarm, that a petition was presented by the commons, in the same year, stating, that certain justices had lately adjudged some matters before them to be treason and accroachment of royal power; they therefore prayed, that it might be declared in parliament *what is the accroachment of royal power* which should occasion to lords a loss of forfeiture, and to delinquents a loss of clergy. To this petition there was given this evasive answer, that wherever such judgment was given, the points of such treason and accroachment were declared therein (b).

Though the commons were disappointed at this time, they did not fail of their object; for, in the 25th year of the king, there was a solemn declaration by statute (c), defining very particularly what should be considered as trea-

(a) Britt, ch. 22.

(b) Pet. Parl. 21 Ed. III. 15.

(c) Stat. 25 Ed. III. c. 2.

Statute of son, and what not. The treasons declared are treasons. under the following heads: To compass or imagine the death of the king, queen, or that of their eldest son and heir; to violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; to levy war against the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere; of which a man must be *provably attainted of open deed* by people of his own condition. Again, to counterfeit the king's great or privy seal, or his money; to bring into the realm false money counterfeit to the money of England, as the money called *Lushburgh*, or other, like to the money of England, knowing it to be false, to merchandize, or make payment in deceit of the king and his people; to slay the chancellor, treasurer, or the king's justices of the one bench or of the other, justices in eyre or of assise, or any other justices assigned to hear and determine, being in their places, doing their offices: all the above cases, says the statute, shall be judged treason that extends to our lord the king and his royal majesty; and of such treasons the forfeiture of the escheats belongs to the king, as well of lands and tenements holden of another, as of himself.

After defining what should be considered as treason against the king's person and dignity, in which case the forfeiture belonged to the king, the statute goes on, and says, there is another manner of treason; that is, when a servant slays his master, a wife her husband, or when a man secular or religious slays his prelate, to whom he owes faith and obedience: and in these treasons, says the statute, the forfeiture of the escheat is to go to the lord of the fee.

Thus far did this act specify cases of treason, whether *high* or *petit*; the distinction by which they have since been known. "And because, says the act, many other like cases of treason may happen in time to come, which

“ cannot be imagined or declared at the present time, it
“ was accorded,” that should any other case, not above
specified and supposed to be treason, happen before any
justices, they should tarry, without going to judgment, till
the cause was shewed and declared before the king and his
parliament, whether it ought to be adjudged treason or
other felony: a method which we have seen it was usual
for the judges to take in other cases of doubt and diffi-
culty. This is followed by a clause that was intended,
probably, as a satisfaction to the commons, and an answer
to their petition above mentioned. “ If, says the statute,
“ any man of this realm ride armed, covertly or secretly,
“ with men of arms against any other to slay him, or rob
“ him, or take him, or retain him, till he has made fine
“ or ransom for his deliverance, it is not the mind of the
“ king, nor his council, that in such case it shall be judged
“ treason; but shall be judged felony or trespass, accord-
“ ing to the laws of the land of old time used, and as the
“ case required.”

It was also enacted, that should any lands or tenements
before that time have come into the king's hands, by
judgment of treason, for any of the above offences, and
have been granted to any others, the parties injured might
have writs of *scire facias* against the *terres tenants*, in
which no protection was to be allowed. If such lands
remained in the hands of the king, writs were to be granted
to the sheriffs to deliver them out of the king's hands
without delay. By this last provision, some partial re-
dress was also given to those who had already suffered by
the oppression of the old law.

Thus did Edward, by abolishing the many constructive
treasons, that had before been conjured up at the pleasure
of the crown and its judges, make his subjects easy on a
point the most important in our whole legal polity. This
statute may be regarded in the light of a new *Magna
Charta*, and a new pillar in our free constitution; the

crime of treason, if indeterminate and vague, being of itself, according to the opinion of a fashionable writer (*a*), alone sufficient to make any government degenerate into arbitrary power.

The law of treason was further reformed by stat. 34 Ed. III. c. 12. Complaint was made to parliament that escheators had seized, by colour of their office, divers lands and tenements as forfeit to the king, for the treason of persons then dead, who had not been attainted during their lives. It is declared by the above statute, that the king and his progenitors had been seised of *the forfeitures of wars of all times*, of which right he did not mean to divest himself, but would continue such forfeitures as had fallen in his time, or that of his father (which is a declaration that the king was entitled to certain forfeitures, without attainder, if the person fell in war); yet the king of his special grace granted, that respecting all forfeitures which fell in the time of his grandfather and other progenitors, as soon as an inquest was returned by the escheator, or other commissioner, into the chancery, the tenant should not be put out of possession, but should be summoned by *scire facias* to state what answer he had to make. In all other cases of dead persons not attainted of treason, it was ordained, that they should not be subject to any other forfeiture than the forfeitures of old time adjudged after the death of persons, by presentment in the eyre or in the king's bench, as of felons *de seipso*, or of others.

It may be doubted how strictly this statute was observed; for, in the latter end of this reign, the commons petitioned that none of the king's officers might seize lands or tenements of persons not attainted of treason or felony in their life-time (*b*).

Riots. When it was declared that riding armed should no longer be construed treason (unless indeed when accompanied with such circumstances as made it a

(*a*) Esp. des Loix, liv. 6. c. 7.

(*b*) Pet. Parl. 50 Ed. III. 73.

levying war) disorders of that sort fell back into the consideration they lay under at common law. Provision had been made by the statute of *Northampton*, 2 Ed. III. c. 3. against such offenders, who, it seems, in these times were very common, and created very great alarm; the course of justice, as well as the peace of society, being liable to disturbance from such armed force. The nature of these tumults may be imagined from the words of this statute, which provided for their suppression. It was enacted, that no man great or small, of what condition soever (except the king's servants in his presence, and his ministers in executing his precepts, or the precepts of their office, and those in their company assisting, and also upon a cry made for arms to keep the peace (a), and that in the places where the occasion happened be so hardy as to come before the king's justices, or other of the king's ministers doing their office, with force and arms; that none bring force in affray of the peace, nor go or ride armed by night or by day, in fairs or markets, or in the presence of the justices or other ministers, or elsewhere, upon pain of forfeiting their armour to the king, and their bodies to prison at the king's pleasure. It was further enacted, that the king's justices in their presence, sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, mayors and bailiffs of cities and boroughs within such cities and boroughs, and borough-holders, constables, and keepers of the peace within their wards, should have power to execute this act. The justices assigned were, at their coming into the country, to inquire how such officers had executed this act, and to punish all defaults. These were the methods prescribed by the statute of *Northampton*, and they were often recurred to, in subsequent times, to suppress riotous and tumultuary meetings.

To go on with the laws made for the punishing of

(a) *De fait darmes de pees.*

offenders. Hawks, as they were instrumental to the diversions of the great, were put under the protection of the law; and guarded with more solicitude than other animals. A person finding a stray hawk was (a) to bring it to the sheriff to be owned, who, after four months and proclamation made, was to keep it, making the finder (if he was a *simple man*, says the statute) some compensation; if he was a *gentleman* (b), and of estate to have the hawk, the sheriff was to re-deliver it to him, taking reasonable costs for the time he had it in his custody. If any one took such a hawk and concealed it from the lord or his falconers, or took it from the lord, he was, upon conviction, to suffer two years imprisonment, and yield to the lord the price of the hawk; and by stat. 37 Ed. III. c. 19. if any stole a hawk and carried it away, not observing the aforesaid ordinance, he was to be dealt with as a thief who stole a horse, or any other thing. Thus was a severe example set by the legislature to be followed in certain regulations that were afterwards made for protection of the game.

Two felonies were created as sanctions to some commercial regulations, which, however, were soon repealed. By stat. 27 Ed. III. st. 1. c. 5. it was made felony to forestall or ingross Gascony wine; but this act was repealed by stat. 37 Ed. III. c. 16. By the statute of the staple, 27 Ed. III. st. 2. c. 3. it was made felony for any man, English, Welch, or Irish, to export wools, leathers, woolfells, or lead, out of the kingdom: but by stat. 38 Ed. III. st. 1. c. 6. the penalty of life and member was repealed, and that of forfeiture of lands and tenements, goods and chattels, still remains.

In the early part of this reign, two new felonies had been created: one, by stat. 5 Ed. III. c. 2. before mentioned (which was confirmed by several (c) others) ordaining, that purveyors should be subject to the same punishment as

(a) Stat. 34 Ed. III. c. 22.
Ed. III. st. 5. c. 15. stat. 36 Ed. III. c. 2.

(b) *Gentils homme.*

(c) Stat. 25

thieves and robbers, if they exceeded the limits of their authority (*a*): another is, stat. 14 Ed. III. st. 1. c. 10. which enacted, that a keeper of a gaol who should by too great duress compel a prisoner to become an approver, should have judgment of felony.

Several laws were made to remove the great impediments thrown in the way of justice by conspirators, champertors, and maintainers of quarrels and suits, against whom the legislature in the reign of Edward I. had made so many provisions (*b*). In stat. 1 Ed. III. st. 2. c. 14. the king commanded, that none of his counsellors, nor of his house, nor of his ministers, nor any man of the realm, great or small, should by himself, or by others, in sending letters, or by other means, take upon him to maintain quarrels and parties in the country, to the disturbance of the common law. To forward the prosecution of such offenders, it was ordained by stat. 4 Ed. III. c. 11. that the justices of one bench or the other, and the justices of assise, when they came to hold their sessions, or to take inquests by *nisi prius*, should, either at the suit of the king or the party, inquire of and determine respecting maintainers, bearers, and conspirators, and those who committed champerty, the same as justices in eyre before might; with a power to adjourn such matters as could not be determined, through the shortness of time, into the court to which they belonged. A similar injunction about maintenance was made in stat. 20 Ed. III. c. 4. and by chap. 5. of the same act, great men were enjoined to dismiss from their service all maintainers, and others who took upon them to interfere in suits, and impede the course of the law. The writ of champerty was still considered only as a criminal proceeding; for in the 50th year of the king the commons prayed, that the chancellor might in

(*a*) Vid. ant. 369, 370.

(*b*) Vid. ant. 127. 212. 239, 240.

such cases grant a writ at the suit of the party, to recover damages in his suit; which, however, was denied by the king (a).

The other statutes upon the subject of criminal law may be considered as making some alteration in the course of bringing offenders to justice, the manner of proceeding there, and the execution of the law upon them.

The statute of Winchester passed in the reign of Edward I. and all laws for the ordering of the police may be treated as ordinances calculated for the better discovery and bringing to justice of suspected persons; that being one of their great objects. It had been ordained by the statute of Winchester (b), that any stranger passing the country in the night, might upon suspicion be arrested, and delivered to the sheriff. It was now ordained, that because many felonies had lately been committed by persons called *roberdesmen, waisters, and draw-latches*, any person suspected of being such might be arrested, *by day or by night*, by the constables of the town (if within a franchise, by the bailiff), and delivered to the sheriff, to be kept in prison till the coming of the justices of gaol delivery. In the mean time the sheriff and bailiffs of the franchise were to make inquiry about the arrest, and return the inquest, with the finding, to the justices when they came; and if they did not make such inquiry, they were to be amerced, and the justices were to do it before they proceeded to the deliverance. In the 10th year of the king certain *articles of the peace* were transmitted into different counties; but it was specially resolved by the parliament, that they should not be considered as a statute. By stat. 28 Ed. III. c. 11. strong injunction is given for the execution of the 2d chapter of the statute of Winchester (concerning hue and

(a) Pet. Parl. 50 Ed. III. 80.

(b) Vid. ant. 213.

cry, and recovery against the hundred), which is specially there re-enacted.

Thus far of bringing offenders into court; next, as to the proceeding there. It seems, that at this time suits for defamation were generally brought in the ecclesiastical court, being avowed subjects of spiritual cognizance only. But this proceeding was carried to great lengths, when persons indicted in sheriffs' tours, and afterwards acquitted before the justices by a procured inquest, would bring a suit in the ecclesiastical court against the indictors for defamation. This being complained of by the commons, it was enacted by stat. 1 Ed. III. st. 2. c. 13. that every person so grieved should have a prohibition in the chancery, formed upon his case.

To insure the due prosecution of indict-
ments when found, it was enacted by chap. 17. Of indict-
ments.
of the same statute, that sheriffs and bailiffs of franchises, and all others that took indictments in their tours or elsewhere, should take them by roll indented (*a*); one part of which was to remain with the indictors, the other with him who took the inquest. This was done in order to prevent the embezzlement of indictments, which, it seems, too frequently happened.

Some abuses arose out of the new practice of introducing a second jury to try an indictment (*b*). Thus, it was a common course for indictments to be taken before sheriffs and other inferior magistrates; but the trial of them, or, as they called it, *the prisoner's deliverance*, used to be deferred till the justices came into the country for that purpose. It is not to be wondered, that, in such an interval, many unfair practices were attempted. This interval also gave room for the indictors to get themselves put on the inquest of de-

(*a*) A similar provision had been made in the time of Edward I. Vid. ant. 211.

(*b*) Vid. ant. 268.

liverance; and therefore it had become one of the commonest challenges taken to a juror, that he was one of the indictors. But, notwithstanding the old law allowed this challenge, it is doubtful how far it was observed; for we find a petition of the commons in the 14 Ed. III. (a) for a law to confirm it. This was at length done by stat. 25 Ed. III. st. 5. c. 3. which enacts, that no indictor should be put on inquests upon deliverance of the inditees of felonies or trespass, if he was challenged for such cause by the person indicted.

It seems that sheriffs extremely abused this authority to take indictments. It is recited by stat. 28 Ed. III. c. 9. that these officers used to procure commissions and general writs empowering them to take indictments; and having, under such authority, caused many to be indicted, would take fine and ransom, and then deliver them, instead of keeping them in custody till the coming of the justices, as the regular course was. It was declared, that all such commissions and writs should be void, and that in future none such should issue.

Another oppression was practised, not only by sheriffs, but gaolers and keepers of prisons, as well within franchises as without, who by duress and severities would compel their prisoners to become approvors, and appeal innocent people, in order to obtain fines for dispensing with their imprisonment. Bystat. 1 Ed. III. st. 2. c. 7. the justices of the one bench and the other, and justices of assise and gaol delivery, were empowered to hear all complaints of this sort by bill, as well at the suit of the party as of the king. We have before seen, that this offence in keepers of prisons (for sheriffs are not named) was made felony by stat. 14 Ed. III. st. 1. c. 10.

As the law now stood, a felon who was appealed, indicted, or outlawed, in one county, and dwelt in another,

(a) Pet. Parl. 14 Ed. III. 30.

being out of the sheriff's jurisdiction, could not be attached. It was therefore enacted by stat. 5 Ed. III. c. 11. that the justices assigned to hear and determine such felonies should direct their writs to all counties in England, to take persons so indicted; a remedy which effectually removed all difficulties.

We have seen the privilege granted by the statute of the staple (*a*) in favour of foreign merchants, to have an inquest mixed of natives and foreigners, where one of the parties was of this country, and one of another. *Jury de medietate linguæ.* This was confined to matters of contract; but by stat. 28 Ed. III. c. 13. it was extended to criminal cases in the following explicit manner: It was enacted, that in all inquests and proofs to be taken or made amongst aliens and denizens, whether merchants or others, as well before the mayor of the staple as any other justices or ministers, *although the king be party* (as in all criminal cases he is), the one half of the inquest or proof should be denizens and the other aliens, if so many aliens and foreigners were in the place: if not, then as many as could be found, and the remainder to be denizens. This liberal spirit towards foreigners had been distinguishing itself through the whole of this reign, particularly in matters that concerned the interests of commerce. Some years before, the invidious distinction that had been kept up between English and French by presentments of *Englishery*, was removed, by the entire abolition of that proceeding (*b*). However, the reason stated by the stat. 14 Ed. III. st. 1. c. 4. for this alteration is of a different kind, namely, that counties were amerced without any knowledge of presentments of *Englishery*, which was a surprize and oppression to the people; and for this reason they were no more to be received by the justices errant.

(*a*) Vid. ant. 395.

(*b*) Vid. ant. 22.

The benefit of
clergy.

The exemption from all secular animadversion claimed by the clergy for the persons of clerks, made a considerable head of inquiry in the criminal law of these times. Notwithstanding the firmness with which it was demanded on one side, and the indulgence which the laity in general gave to the claim; though it was confirmed by solemn declarations and aided by long prescription, it was always viewed with jealousy, and considered rather as an usurpation which for particular reasons was endured, than an established and unquestionable part of the old common law. Under such a title, this privilege must depend on the circumstances of times for its support: we accordingly find it one while respected, and at another disregarded, by the government. In the 18th year of the king it was enacted^(a), that an archbishop should not be impeached criminally before the king's justices. This might perhaps be rather a law in protection of the peerage than of the clergy, and was occasioned by the late disputes the king had with the archbishop. In the 25th year of this king the clergy complained in parliament, that a certain knight, being one of the clergy, had judgment of treason given against him, to be hanged and quartered: they complained also of a like judgment against a priest for killing his master. These encroachments, as they termed them, or at least these symptoms of the precariousness of the privilege claimed by clerks in criminal questions, required an act of parliament to adjust and define it with more certainty. Accordingly, in the famous statute *de clero*, 25 Ed. III. st. 3. which was made to ascertain some other of their claims, two chapters were inserted for this very purpose. By ch. 2. it was enacted, that all manner of clerks, as well secular as religious, who should be convicted before any secular justices for treason or felony touching other persons than the king

(a) Stat. 18 Ed. III. st. 3. c. 1.

himself or his royal majesty, should from thenceforth freely have and enjoy the privilege of holy church, and should, without any impeachment or delay, be delivered to the ordinaries demanding them. In consideration of this grant, and that it might not be productive of an entire failure of justice, the statute says, the archbishop promised the king, that he would procure an ordinance to be made for the punishment and safe custody of clerks so delivered to the ordinaries, in order that no clerk might be encouraged to offend through want of correction (a).

Another complaint of the clergy was, that when clerks were demanded by their ordinary, they were often remanded to gaol by the justices, under surmise that there were other charges against them; though the common law, as they said, required that a clerk should not, in such case, be remanded to gaol, but ought to be presently arraigned of *all* his offences, or otherwise delivered to the ordinary: accordingly it was ordained by ch. 3. of this statute, that all justices and secular judges throughout the realm should observe this point.

The consequences that followed from this last chapter of the statute will be seen hereafter. The former, though nothing more than a declaration of the common law with respect to the persons intitled to clergy, yet, from the general way in which it is worded, had the effect of extending this privilege to some felonies which did not before enjoy it; and took it from some treasons where before it was allowed. Thus, among other felonies, it was hereby extended to the felonious burning of houses; an offence which at common law was not allowed clergy. On the other hand, by the common law recognised by this statute, all treasons except those against the king's person and dignity were intitled to clergy: accordingly, the offence

(a) Vid. ant. 134.

of coining and some others were intitled to this benefit. But the crime of coining being by the statute of treasons expressly raised from the order of common treasons to the rank of one against the king's person and dignity, it became *eo nomine* excluded from clergy by the exception of treasons against the king's person in the statute *de clero*, ch. 2. Thus, when these two statutes are put together, we find the old distinction between treasons clergyable and not clergyable still remained; and was grounded upon the same principle as at common law, namely, as they were, or were not, against the king's person. Treasons not against the king's person, namely, those which have since been called petit treason, were still intitled to their clergy; and treasons against the king's person (which have since been denominated high treason) were *eo nomine* deprived of clergy.

Of pardons. There was through all this reign much complaint of the too easy granting of pardons, which contributed greatly to encourage manslaughters, robberies, felonies, and other trespasses. To put some check upon this, it was ordained by the statute of Northampton, stat. 2 Ed. III. c. 2. that charters of pardon should not be granted except where the king could do it consistently with his oath; which the statute explains by saying, where a man slayeth another in his own defence, or by misfortune (a). That statute was confirmed by stat. 10 Ed. III. st. 1. c. 2. and as a further security, it was ordained by ch. 3. of the same statute, that all those who already had charters of pardon should, by a certain time, come before the sheriffs and coroners of the counties, and find six good and sufficient mainpernors to bear themselves well and lawfully; and the charters of such as did not find such mainprise, or, having done so, broke the peace, were to be void. In case of future pardons, the parties, within three months

(a) Vid. ant. 21, 22.

after the granting, were to find the like mainpernors, and the pardons to be void as in the former case. This was doing something more than had been effected by the general declaration of the statute of Northampton; and stat. 14 Ed. III. st. 1. c. 15. went still farther, by declaring all pardons granted contrary to that statute to be void. In the 21st year of the king there was a petition of the commons on this subject; when the king answered, that he would advise with his council, so that no such charter should be granted, unless it was for the honour of himself and his people (*a*). At length the evil of improper pardons was attributed to the feigned and untrue suggestions upon which they had been obtained. It was therefore enacted by stat. 27 Ed. III. st. 1. c. 2. that in every charter of pardon granted on the suggestion of any one, the suggestion, and the name of him that made it, should be comprized in the charter; and should the suggestion be afterwards found untrue, the charter was to be void. The justices, before whom they were alleged, were to enquire of such suggestions, and if they appeared untrue, they were to disallow the pardon: this was to extend as well to pardons already granted, as to those in future. This seemed the most effectual of all the remedies hitherto devised, as it, after all, left the party to the judgment of the common law.

There was an act made for the government Process of *capi-* of process before justices of *oyer* and *terminer*, as and *exigent*. that deserves notice, as it settled that point very particularly. It was enacted by stat. 25 Ed. III. st. 5. c. 14. that after a person was indicted of felony before the justices in their sessions of *oyer* and *terminer*, it should be commanded to the sheriff to attach his body by writ or precept, called a *capias*; and if the sheriff returned in the writ that the body was not found, another writ of *capias* should incontinently be made

(a) Pet. Parl. 21 Ed. III. 53. 62.

returnable at three weeks; and in the same writ or precept it was to be comprized, that the sheriff should cause his chattels to be seized and safely kept till the return-day of the writ. If the sheriff returned that the body was not found, and the indictree came not, the *exigent* was to be awarded, and the chattels forfeit, as the law of the crown ordained; but if he came and yielded himself, or was taken by the sheriff or other officer before the return of the second *capias*, then the goods and chattels were to be saved.

In the 18th year of the king two acts were made to settle the process of *exigent* and *outlawry* in particular cases. It was enacted and declared by stat. 18 Ed. III. st. 1. that an *exigent* should lie in the following cases, and in no other: against those who receive the king's money or wools, taking them of the people, and then carrying them away, in fraud of the king; against those who bring wools to the parts beyond the seas, without being cocketted, or paying custom or subsidy, according to the assessment; against customers and finders (a) who connive at the same; against lay-ministers who receive the king's money and retain it; against conspirators, confederators, and maintainers of false quarrels; against those who bring routs in the presence of the justices or other the king's ministers, or elsewhere in the counties, in affray of the people, to obstruct the course of law; against those who bring, or procure false money to be brought. If none of the above offenders could be brought in by attachment and distress (for that was always to be the first process), then an *exigent* was to go (b). It is clear this parliamentary declaration was only to settle the course in the particular cases there mentioned; and it was not intended (notwithstanding the general way in which it is worded, and not against any other) that an *exigent* should lie in no other case; for if so, it would not have lain in robbery,

(a) *Quære*, if not searchers. (b) Vid. ant. vol. I. 483, 484.

murder, and many other felonies, contrary to the plainest reason of the thing. It appears, that it was only intended to remove some doubts which were entertained at this time concerning process of outlawry in certain cases of *trespass*, of which sort were most of the instances recited in the above statute ; for it was in the same year enacted by stat. 18 Ed. III. st. 2. c. 5. in a more general way, that no *exigent* should thenceforth issue, in case where a man was indicted of *trespass*, unless it was against the peace, or of things contained in the before-mentioned act. We see that there had already grown a distinction between trespasses ; some being considered as against the peace, and others not. When this had once prevailed in cases that were treated criminally, the way was opened for improving on the idea in civil writs of trespass, which we shall hereafter see were, upon this principle, branched out into such as were *vi et armis*, and such as were not.

It was endeavoured to make an alteration in the law of forfeiture in cases of felony, but the attempt did not succeed. In the 21st of Edward III. the commons complained that a man indicted or appealed of felony, who did not surrender himself at the *exigent*, forfeited his chattels, although he was acquitted of the felony, without enquiry (a) whether he fled or withdrew himself. Now, as a man might be indicted in a foreign county, and be ignorant of any proceeding against him, they prayed, that no man should lose his chattels but where it was found by verdict that he fled. To this it was answered, that the ancient law should be kept till the king by advice of his council should otherwise ordain (b).

It was also attempted to change the law as far as regarded the forfeiture of the wife's dower by the felony of the hus-

(a) Vid. ant. 16.

(b) Parl. Pet. 21 Ed. III. 35.

band (a). The commons presented a petition to this effect in the 1st of Edward III. (b) but it was not assented to.

The law had always required allegations in writs to be particular and precise; the same in appeals: but nothing has yet appeared of the forms of indictments. As it was not till the time of Edward I. that these were put into writing, there had not been sufficient leisure to discuss the circumstances and property thereof. But we find, that certain indictments against ordinaries and their ministers, for extortions and oppressions, had occasioned clamour, because they did not sufficiently *put in certain* the offence charged. To remedy this, it was enacted, by stat. 25 Ed. III. st. 3. *de clero*, c. 9. that justices should not put ordinaries or their ministers to answer upon indictments for *general* extortions or oppressions, unless they put in certain in what manner such extortions or oppressions had been committed.

Origin of justices of the peace.

In this reign several regulations were provided for the keeping and maintenance of the *peace*; which, besides increasing the powers of ancient magistrates, new-modelled some of them, and created new ones which were thought to be better calculated for such an employment. The statute of Winchester was the great system of police in these days, and on the full execution of that was thought to depend the domestic peace of the whole kingdom. For punishing breaches of that statute, and restraining other offences more immediately concerning the police, was the commission of *oyer* and *terminer* called *trailbaston* instituted by Edward I (c).

The *peace*, in the most extensive sense of the word, took in, perhaps, the whole of the criminal law; and as

(a) Vid. ant. vol. I. 379. (b) Parl. Pet. 21 Ed. III. 13.

(c) Vid. ant. 277.

most offences were said to be against the peace, all those magistrates who had authority to take cognizance of such offences, might be considered as a sort of guardians of the peace *ex officio*: such were the king's justices, inferior judges, and ministers of justice, as sheriffs, constables, tithingmen, headboroughs, and the like; all these were *ex officio* guardians and conservators of the peace. Others were conservators of the peace by tenure or prescription; others were elected in full county court, in pursuance of the writ directed to the sheriff for that purpose. Besides these, extraordinary ones were appointed occasionally by commission from the king (*a*). The manner in which these officers might exercise their authority was, by committing to custody those whom they saw actually breaking the peace; or, as is said, they might admit them to bail, or oblige them to give sureties for keeping the peace. This might be done by them all, even down to the constable (*b*).

The violent conclusion of the last reign by the imprisonment, deposal, and murder of the old king, succeeded by the elevation of a minor to the throne, occasioned the appointment of certain new officers, in whom the court could have more trust than in the common conservators. Apprehending that some might be alarmed at the proceedings of the court, and that others might take advantage of the unsettled state of the executive power to raise disturbance, special orders were issued, in the name of the new king, to every sheriff to preserve the peace of the county; and, in a few weeks after, it was ordained by stat. 1 Ed. III. c. 16. "for the better keeping and maintenance of the peace" "that in every county, good men and lawful, that" "were no maintainers of evil, or barrators in the county," "should be assigned to keep the peace." This short and

(*a*) Lamb. Iren. book 1. c. 3.

(*b*) Ibid. p. 14, 15.

general act gave a very confined authority to these new officers; the persons appointed by this act being nothing more than *conservators of the peace* nominated by the crown, as auxiliary to those who were such by the titles above-mentioned. Indeed, they seem very little more than such officers as were appointed in the reign of Edward I. for the particular purpose only of attending to the due execution of the statute of Winchester (*a*); from which ordinance probably it was, that the present hint was taken.

Three years after this, these officers were intrusted with greater powers, having the additional authority to take indictments. It was enacted by stat. 4 Ed. III. c. 2. (after some regulations for the appointment of justices of assise and gaol-delivery) that there should be *assigned* good and lawful men in every county to keep the peace; and that at the time of the *assignment*, mention should be made, that such as should be indicted or taken by the said keepers of the peace, should not be let to mainprise by the sheriffs, or their ministers, if they were not by law mainpernable; and that such as were indicted should not be delivered but at the common law. The justices of gaol-delivery were to have power to deliver the gaols of such as were indicted before the keepers of the peace; and such keepers were directed for that purpose to send their indictments before the justices. It was further enacted, that such keepers should have power to enquire of sheriffs, gaolers, and others, in whose ward such indicted persons should be, if they made deliverance, or let to mainprise any so indicted and not mainpernable; and they were to punish such officers, if they did any thing against this act.

After this, there was no alteration in their authority till the 18th of this reign, when they were empowered to *hear*

(*a*) Vid. ant. 213.

and determine. It was enacted by stat. 18 Ed. III. st. 2. c. 2. that two or three, of the best reputation in the counties, should be assigned keepers of the peace by the king's commission; and when need should be, they, with others wise and learned in the law, should be assigned by the king's commission to *hear and determine* felonies and trespasses done against the peace in the same counties, and to inflict punishment according to law and reason, and the circumstances of the fact. When, in the twentieth year, it was prayed by the commons, that they might have a power to hear and determine felonies, it was answered, that the king would appoint learned persons for that office (a).

So beneficial was this establishment of keepers of the peace considered by the people, that it became a favourite in the country, and was exalted in preference to some institutions that were more ancient. In the twenty-first year of the king, the commons being charged to advise the king what was the best way of keeping the peace of the kingdom, they recommended, that six persons in every county, of whom two were to be *de plus grantz*, two knights, and two men of the law, and so more or less as need should require, should have power and commission out of chancery to hear and determine the keeping of the peace; and that all courts of *trailbaston* should cease, they being oppressive to the people, and contributing nothing towards preserving the peace, nor the punishment of felons or trespassors (b).

In conformity with these several statutes and petitions, commissions had been at various times framed, *assigning* certain persons to execute the powers which the statutes authorized the king to confer. In these commissions were

(a) Parl. Pet. 20 Ed. III. 29.

(b) Parl. Pet. 21 Ed. III. 70.

inserted, besides the general powers for keeping the peace, a special charge to enforce the observance of certain statutes. Thus in the second year of this king, they had the statute of Winchester in charge; in the twentieth year the statute of Northampton, and stat. 5 Ed. III. c. 14. against roberdsmen, draw-latches, &c. (a) In the twenty-fifth of this king, by the statute called the statute of labourers, we find that *justices* were to be assigned for the execution of that act (b); and they were to hold a session in all the counties of England four times in the year; that is, at the feast of the *Annunciation* of Our Lady, of Saint *Margaret*, of Saint *Michael*, and of Saint *Nicholas* (c). It is most probable the persons assigned *justices* to execute this statute were the keepers of the peace, who, having already by stat. 18 Ed. III. an authority to hear and determine, might with propriety enough be called *justices*; though there is no trace of their being actually so called till seventeen years after. Indeed the authority given by that statute is to them, not singly, but jointly with others, as occasion should require; their own commission going no further than the bare keeping of the peace (d). As the general standing authority to hear and determine was not given till stat. 34 Ed. III. it was not, probably, till then that they were commonly reputed and called *justices*, as we find they are by stat. 36 Ed. III.

The stat. 34 Ed. III. c. 1. is more full than any of the former in setting forth the qualifications of these new officers, and the extent of their power. It enacts, that in *every* county there should be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy (e) in the county, with some learned in the law. These were to have power to restrain offenders, rioters,

(a) Lamb. Iren. b. 1. c. 9. (b) Ch. 3. (c) Ch. 7. (d) Lamb. Iren. 20, 21, 22, 23. (e) *Des multz vauez.*

and all other barrators, and to pursue, arrest, take, and chastise them according to their trespass or offence; and cause them to be imprisoned and duly punished, according to their discretion and judgment. The act further directs them “also to inform themselves, and to inquire of all “those who had been pillors and robbers in the parts “beyond the sea, and were now returned, and went wandering about, not labouring as they were wont in times “past, and to take and arrest all they found, by indictment or by suspicion, and to put them in prison; and “to take of such as were not of good fame, wherever “they were found, sufficient security and mainprise of their “*good behaviour* towards the king and his people, and to “duly punish others, to the intent that people, merchants, “and other travellers might not be endangered by such “rioters and rebels; and also to hear and determine, at the “king’s suit, all manner of felonies and trespasses done in “the same county, according to the laws and customs of “the realm.” This was the first authority they had to take *sureties for good behaviour*, and indeed the first mention of it in any statute or law book. By ch. 5. of the same act, those who were assigned to keep the peace were empowered to enquire of measures and weights, according to stat. 25 Ed. III. st. 5. c. 9.

The last statute concerning the keepers of the peace is stat. 36 Ed. III. st. 1. c. 12. which enacts, that in the commissions of *justices* of the peace (for so they were now called) and of labourers, express mention should be made, that they hold their sessions four times in the year; one session *in octabis* of the Epiphany, the second within the second week in Lent, the third betwixt the feast of Pentecost and St. John the Baptist, the fourth *in octabis* of St. Michael.

Thus stood the commission of the peace at the close of this reign. The keepers of the peace were become justices, presiding over a court, where many matters of considerable importance to the order and quiet of society were cognizable, besides the important jurisdiction over felonies and trespasses. The consideration of these magistrates was greatly heightened by the accession of business that was thrown upon them by later acts of parliament, which have gradually entrusted them with matters of very material concern to the property and liberty of the subject.

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